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HARVARD LAW LIBRARY



REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO

BY
GEORGE W. McCOOK

VOLUME I

HARVARD LAW LIBRARY.

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JUDGES
OF THE
SUPREME COURT OF OHIO,

FOR THE YEAR COMMENCING

SECOND MONDAY OF FEBRUARY, 1852.

HON. WILLIAM B. CALDWELL, CHIEF JUSTICE.
HON. THOS. W. BARTLEY,
HON. JOHN A. CORWIN,
HON. ALLEN G. THURMAN,
HON. RUFUS P. RANNEY, } **JUDGES.**

Attorney-General,
HON. GEO. E. PUGH.

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JUDGES
OF THE
SUPREME COURT OF OHIO.

FOR THE YEAR COMMENCING

SECOND MONDAY OF FEBRUARY, 1853

HON. THOS. W. BARTLEY, CHIEF JUSTICE.	
HON. JOHN A. CORWIN,	} JUDGES.
HON. ALLEN G. THURMAN,	
HON. RUFUS P. RANNEY,	
HON. WILLIAM B. CALDWELL,	

Attorney-General,

HON. GEO. E. PUGH.

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ORDINANCE OF CONGRESS.**

**SAMUEL H. PARSONS,
JAMES M. VARNUM,
JOHN ARMSTRONG.**

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**RETURN J. MEIGS,
SAMUEL HUNTINGTON,
WILLIAM SPRIGG,
GEORGE TOD,
DANIEL SYMMES,
THOMAS SCOTT,
THOMAS MORRIS,
WILLIAM W. IRVIN,
ETHAN ALLEN BROWN,
CALVIN PEASE,
JOHN McLEAN,
JESSUP N. COUCH,
CHARLES R. SHERMAN,**

**PETER HITCHCOCK,
ELIJAH HAYWARD,
JOHN M. GOODENOW,
REUBEN WOOD,
JOHN C. WRIGHT,
JOSHUA COLLETT,
EBENEZER LANE,
FREDERICK GRIMKE,
MATTHEW BIRCHARD,
NATHANIEL C. READ,
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PREFACE.

THE first Constitution of Ohio was adopted November 29, 1802, and continued in force, without alteration, until September 1, 1851. It provided that the judicial power of the state, both as to matters of law and equity, should be vested in a Supreme Court, in Courts of Common Pleas for each county, in justices of the peace, and in such other courts as the legislature might, from time to time, establish; that the Supreme Court should consist of three judges, any two of whom should be a quorum; but the legislature might add another judge after five years; that it should have original and appellate jurisdiction, both in common law and chancery, in such cases as should be directed by law, and such criminal jurisdiction as the law might point out; and the judges thereof should be conservators of the peace throughout the state. And it was required to hold a term once a year in each county. The judges to be appointed by the general assembly, and to hold their offices for the term of seven years.

By the first act organizing the courts, passed April 15, 1803, it was provided that one of the supreme judges should be commissioned by the governor as chief judge of the court, and that the other judges and all future judges of that court should have precedence according to the date of their commissions; and when their commissions should be of the same date, then according to their respective ages. It was subsequently enacted that if a judge should be elected for two or more terms in succession, he should take precedence according to the date of his first commission.

The jurisdiction of the Supreme Court was from time to time defined by law. Certain original jurisdiction was given to it, and a very large appellate jurisdiction from the inferior courts. Although it was the court of the last resort, no provision for reporting its decisions was made until 1823. On the 20th of January of that year, an act was passed making it the duty of all the judges, then four in number, to meet annually in Columbus, immediately after the close of their circuits, in order to consult upon and decide all questions of law which should be reserved by the Supreme Court in the counties for decision at said session, and the judges were required to appoint a reporter to report all such decisions, and

such other important decisions as they should direct to be reported, and to publish the same. These decisions are contained in the twenty volumes of Ohio Reports, beginning with the session of 1823, and ending with the session of 1851, and are called the Decisions of the Supreme Court in Bank, or, briefly, of the Court in Bank.

But few, comparatively speaking, of the circuit decisions of the Supreme Court have been reported. Several are contained in the first volume of Ohio Reports, having been published therein, by order of the judges, under the law above mentioned, and some cases may be found in the Western Law Journal. The only volume of circuit decisions is Wright's Reports of cases decided in the years 1831 to 1834, inclusive, while he was on the bench. The only volume of common pleas decisions is Tappan's Reports, published in 1831. The cases contained in it were decided in 1816, 1817, 1818, and 1819.

Three courts were created by the general assembly under the constitution of 1802, namely, the Superior and Commercial Courts of Cincinnati and the Superior Court of Cleveland. They ceased to exist on the second Monday of February, 1853, when their unfinished business was transferred to the Courts of Common Pleas.

On September 1, 1851, the new constitution of the state took effect. It vests the judicial power in a Supreme Court, in District Courts, Courts of Common Pleas, Courts of Probate, justices of the peace, and such other courts, inferior to the Supreme Court, in one or more counties, as the general assembly may, from time to time, establish. It provides that the Supreme Court shall consist of five judges, a majority of whom shall be necessary to form a quorum, or to pronounce a decision. That it shall have original jurisdiction in quo warranto, mandamus, habeas corpus, and procedendo, and such appellate jurisdiction as may be provided by law. That it shall hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law. That its judges shall be elected by the electors of the state at large; the judges first elected to be classified by lot, so that one should hold for one, one for two, one for three, one for four, and one for five years, and that the term of all judges subsequently elected should be five years.

In respect to the Common Pleas, it is provided that the state shall be divided into nine common pleas districts, of which Hamilton county shall constitute one, of compact territory, and bounded by county lines; and each of said districts, consisting of three or

more counties, shall be subdivided into three parts, of compact territory, bounded by county lines, and as nearly equal in population as practicable; in each of which one judge of the Court of Common Pleas for said district and residing therein, shall be elected by the electors of said subdivision; and Courts of Common Pleas shall be held, by one or more of these judges, in every county in the district, as often as may be provided by law, and more than one court, or sitting thereof, may be held at the same time in each district. That the jurisdiction of the Courts of Common Pleas, and of the judges thereof, shall be fixed by law.

District Courts are composed of the judges of the Courts of Common Pleas of the respective districts, and one of the judges of the Supreme Court, any three of whom are a quorum, and are required to be held in each county therein at least once in each year; but if it shall be found inexpedient to hold such court annually in each county of any district, the general assembly may, for such district, provide that such court shall hold at least three annual sessions therein, in not less than three places. And the general assembly, may, by law, authorize the judges of each district to fix the times of holding the courts therein. The District Court has like original jurisdiction with the Supreme Court, and such appellate jurisdiction as may be provided by law.

There shall be established, provides the constitution, in each county, a Probate Court, which shall be a court of record, open at all times and holden by one judge, elected by the voters of the county, who shall hold his office for the term of three years, and shall receive such compensation, payable out of the county treasury, or by fees, or both, as shall be provided by law; which court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, and such jurisdiction in habeas corpus, the issuing of marriage licenses, and for the sale of land by executors, administrators, and guardians, and such other jurisdiction, in any county or counties, as may be provided by law.

Justices of the peace are elected by the electors in each township. Their term of office is three years and their powers and duties are regulated by law.

All judges, other than those named, must be elected by the electors of the judicial district for which they may be created, but not for a longer term than five years. The common pleas judges are required to reside in the districts for which they are elected, and

their term of office is five years. If a judgeship become vacant before the expiration of the regular term, the vacancy is filled by appointment by the Governor until a successor is elected and qualified, and such successor is elected for the unexpired term at the first annual election that occurs more than thirty days after the happening of the vacancy. Judges of the Supreme and Common Pleas Courts receive such compensation as the law provides, which can not be diminished or increased during their term of office. They can receive no fees or perquisites, nor can they hold any other office of profit or trust under the authority of this state or of the United States. All votes for either of them for any elective office under the authority of this state, given by the general assembly or the people are declared to be void. The general assembly may increase or diminish the number of supreme judges, the number of common pleas districts, or of judges in any district, change the districts or the subdivisions thereof, or establish other courts whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition, or diminution shall vacate the office of any judge. Judges may be removed from office by concurrent resolution of both houses of the general assembly, if two-thirds of the members elected to each house concur therein; but no such removal can be made except upon complaint, the substance of which must be entered on the journal, nor until the parties charged shall have had notice thereof and an opportunity to be heard.

The several judges of the Supreme Court, of the Common Pleas, and of such other courts as may be created, may, respectively, have and exercise such power and jurisdiction at chambers, or otherwise, as may be directed by law.

The general assembly may establish courts of conciliation and prescribe their powers and duties; but such courts may not render final judgment in any case except upon submission by the parties of the matter in dispute, and the agreement to abide such judgment.

The supreme and common pleas judges in office when the present constitution took effect were continued by it in office until the second Monday of February, 1852; so the present Supreme and Common Pleas Courts, which are creations of the new constitution, began their existence upon that day. The unfinished business of the Supreme Court in Bank was transferred to the new Supreme Court, of the Supreme Court in the counties to the District Courts, the probate business of the former Courts of Common Pleas to the

Probate Courts, and their other business to the new Courts of Common Pleas.

Such is, in substance, our new judicial system as ordained by the constitution. In some respects it is similar to the old system; in others very different. The most striking changes are the creation of the District and Probate Courts and the limit to the original jurisdiction of the District and Supreme Courts.

The general assembly has conferred an extensive appellate jurisdiction upon the Supreme and District Courts, and has given to the Courts of Common Pleas substantially the same jurisdiction possessed by the former courts of that name, except so far as it has been vested in the Courts of Probate. In addition to the jurisdiction conferred by the constitution, a large criminal jurisdiction over offenses not punished capitally or by imprisonment in the penitentiary has been devolved upon the Probate Courts. The jurisdiction of justices of the peace has been somewhat enlarged. A Criminal Court has been created for Hamilton County, Police Courts authorized in the larger cities, and an additional Common Pleas judge created in the fourth judicial district. A code of civil procedure has been adopted by which the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished, and in their place there is to be hereafter but one form of action, which shall be called a civil action, the proceedings in which are prescribed in detail. All pleadings must be verified by affidavit and parties are permitted to testify in their own behalf. Appearance terms are abolished, and very summary and coercive modes provided to enforce the orders and judgment of the courts or judges. A large jurisdiction at chambers has been conferred upon the several judges of the Supreme and Common Pleas Courts. The powers and duties of the Probate Courts have been defined by another code, and those of justices of the peace by a third. A vast number of statutes in force when the constitution took effect have been repealed and their places supplied by three codes and other acts. In a word, a great change has been made in our judicial system and laws, of which but a general idea can be given in the limits of a preface. To be fully understood it must be studied in its details as well as in its general scope.

At the first election under the new constitution, held in October, 1851, William B. Caldwell, Thomas W. Bartley, John A. Corwin, Allen G. Thurman, and Rufus P. Ranney were elected Judges of the Supreme Court. They went into office February 9, 1852. The assignment of their terms by lot, as provided in the constitution,

resulted as follows: To Judge Caldwell, 1 year; Bartley, 2 years; Corwin, 3 years; Thurman, 4 years, and Ranney, 5 years. Judges Caldwell and Bartley have since been re-elected. By a statute passed February 19, 1852, the judge having the shortest time to serve, not holding his election by appointment or election to fill a vacancy, shall be the chief justice, and as such preside at all terms of the Supreme Court, and in his absence the judge having in like manner the next shortest time to serve shall preside in his stead.

At the March term, 1852, George W. McCook was appointed reporter. This volume begins with the first decision of the court, and contains all the cases decided at the March term, 1852, and January term, 1853. By law it is the commencement of a new series, to be entitled the Ohio State Reports, and is therefore numbered Volume 1.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO,
MARCH TERM, 1852.

PRESENT:
HON. WILLIAM B. CALDWELL, CHIEF JUSTICE.
HON. THOMAS W. BARTLEY,
HON. JOHN A. CORWIN,
HON. ALLEN G. THURMAN,
HON. RUFUS P. RANNEY, } **JUDGES.**

**WILLIAM P. CREED AND OTHERS v. THE PRESIDENT, DIRECTORS,
AND COMPANY OF THE LANCASTER BANK.**

Under the Ohio statute, 46 Laws, 90; Curwen's Rev. Stat. chap. 861, sec. 3, the court, upon a bill of review, are required to look into the evidence upon which the original decree was founded. The cases of *Ludlow v. Kidd*, 2 Ohio, 381, and *Hey v. Stevens*, 15 Ohio, 317, disapproved by Chief Justice Caldwell.

When a person purchases property with his own funds, and places the title in the name of a stranger, the legal presumption is, that he made such purchase for his own use, and that the property is held in trust for him.

But where such purchase and conveyance is made by a man to a member of *his own family, the presumption is that the property is intended as a [2 gift or advancement.

These are, however, merely abstract presumptions, that may be rebutted by

Creed v. Lancaster Bank.

circumstances, or by evidence going to show a different intention; and each case has to be determined by the reasonable presumption arising from all the facts and circumstances connected with it. If, therefore, the court can discover, from all the circumstances, a manifest intention in the donor to bestow a gift upon a person not a member of his family, they will so regard it.

The mere fact that the donor subsequently becomes insolvent, will not avoid such a gift. It must be shown that an intention to defraud future creditors existed in the mind of the donor, at the time the gift was made, to justify the court in setting it aside.

When the directors and legally constituted agents of a corporation have, for many years, acquiesced in a subscription to stock, made by a person in the names of his children or others, who have exercised acts of ownership over the stock, and voted upon it, without objection, as their own, the corporation will not afterwards be allowed to treat the subscription as if it were a fraudulent use, by the original subscriber, of mere names, to secure a greater number of votes than he would be entitled to, under the by-laws, if the stock had stood in his own name.

Persons who have an interest in the subject-matter affected by the original decree, may properly be joined as complainants in a bill of review.

Whoever takes an assignment of stock, with notice of a prior assignment which conveyed the legal title, acquires no interest therein.

Where the defendants in the original cause are in default in not answering a supplemental bill, but the decree of the court is not founded on the charges in the supplemental bill, but is contradictory thereto, such default will not operate as a bar to a bill of review.

THIS is a bill of review, filed by William P. Creed and others, praying for the reversal of a decree of the Supreme Court of Fairfield county, made in the year 1846, against them, in favor of the Lancaster Bank. The original bill was filed by the Lancaster Bank, in March, 1843, as the creditor of John Creed, seeking to subject certain stock of the bank, standing in the name of the other defendants, to the payment of his liabilities to the bank; alleging that this stock was held by the other defendants for his use.

Some of the facts necessary to an understanding of the case are as follows:

The Lancaster Bank was organized in 1816, and continued 3] *to do a banking business until 1842. At the time the stock of the bank was taken, John Creed subscribed twenty shares in his own name, and paid the first installment; he also subscribed for twenty shares in the name of Margaret D. Creed, his wife, and twenty

shares in the names of each of his three sons, John M. Creed, William P. Creed, and George Creed, all of whom were small children. He also, at or near the same time, subscribed for four shares in the name of John Manis, and ten shares each in the names of Benjamin Smith, junior, and James H. Smith; the two last of whom were his brothers-in-law, and young boys.

By purchases from different individuals, commencing in the latter part of 1815, and extending to 1819, John Creed had conveyed to his daughter, Mary Creed, who was born shortly after the first subscription of stock, twenty-nine shares of stock. In December, 1820, John Creed, as guardian of his daughter Mary, transferred to his infant daughter, Elizabeth, nine of the twenty-nine shares standing in Mary's name, and in June, 1829, James Green transferred to Elizabeth one share, making ten shares in her name.

In 1828, George Lee transferred to Jane Creed, the youngest daughter of John Creed, and who was then about five years of age, ten shares, which was subscribed for and purchased by John Creed. This stock was partly paid for by installments on stock, and partly by the dividends of profits. The amounts paid in each way is not definitely determined by the evidence. So far as payments were made by installment, they were paid by John Creed, and those from whom he purchased. This stock, as well as the stock of the bank generally, was not fully paid up until 1829. John Creed had made divers purchases of stock in his own name, commencing in 1818, and closing in 1828, by which he acquired thirty shares, in addition to the twenty subscribed by him in his own name. * These fifty shares still stand in his name; as also the twenty shares subscribed in the name of John M. Creed, which on the books of the bank were transferred to him about the year 1840. The other stock remained in the *names of the [4 persons above indicated. It is stated by some of the witnesses that the children of John Creed claimed this stock as their own, and exercised acts of ownership over it; they sometimes voted it personally and sometimes by proxy. The first certificates of stock were issued in 1832, to each of the persons in whose name it stood. The first declarations of John Creed given in evidence in reference to the ownership of this stock, was his statement made to John M. Creed, in 1835, or 1836, when he spoke of having provided for his children by giving them this stock. This was before his embarrass-

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9] *How, then, stands the decree on the facts of the case? There is no allegation in the bill that the disposition of this stock was made in fraud of creditors. That question has, however, been raised in argument, and it is said that John Creed, from 1816, was always more or less indebted to the bank, and that, therefore, these settlements could not be upheld as against its claims. Numerous authorities have been referred to, illustrative of the rules of law on this subject. These we do not think it necessary to examine. The facts of this case are such that that question can not be legitimately raised. John Creed was a man engaged in very extensive and various business. He was the president of the bank nearly the whole time of its existence. He perhaps all the time had a stock note in the bank, which was renewed from time to time. Sometimes he had a loan equal to the amount of his stock, sometimes greater, but frequently much less.

As we have before seen, from 1816 to 1837, he was a man of large property, prosperous, and unembarrassed in all his business; able to pay his debts when called for, and did pay them. We have no evidence of any debt being in existence at the time these stock transactions took place that is now held by the bank. The maxim that a man must be just before he is generous, is one that is applied to a debtor in favor of his creditors; but I know of no policy of law that is opposed to a wealthy man being generous, merely because the property which his generosity induces him to give might at some time be needed to pay a future creditor. It would, indeed, be a strange policy that would discountenance the giving by those that are wealthy, of their abundance to those who may stand in need of it. Indeed, there is no more objection against a man, if he be able to do it, giving away his property, than there is to his selling it. It is only where existing creditors are injured by it, or where there is a fraudulent intent as to subsequent creditors, that a gift of property can be objected to. There was nothing of that kind in this case.

The next, and, as we think, the great question in the case, is one of intention. Did John Creed intend his stock as an *advancement or gift to his children and the others to whom it was given? The rule as to the presumption in such cases is properly laid down by the counsel for the bank, from 2 Maddock's Chancery, 112; where a person purchases property with his own funds, and places the title in the name of a stranger, the legal pre-

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sumption is that he made such purchase for his own use, and that the property is held in trust for him. But when such purchase and conveyance is made by a man to a member of his own family, the presumption is the other way, and the property is held to be a gift or advancement. These are, however, mere abstract presumptions that may be rebutted by circumstances or evidence going to show a different intention, and each case has to be determined by the reasonable presumptions arising from all the acts and circumstances connected with it; so that it may happen, that where property is thus purchased and placed in the name of a stranger, the presumption that the law will draw, taking all the circumstances into consideration, will be that the property was intended for and vested absolutely in the person in whose name it was placed. On the other hand, it frequently occurs that property purchased and paid for by the father and placed in the name of a child, even where there is no positive evidence of trust, will be presumed, from the facts connected with it, to be intended for the use of the father, and held in trust for him. Lapse of time, connected with continued acts of recognition of the right of the donee, are always potent and frequently controlling circumstances in determining a question of intention in a case of this kind.

John Creed had the capacity to make a provision of this kind for his family, and he ostensibly did so. He commenced in 1816, by giving to his wife and each of his children \$2,000 in stock. As his family increased, he made provision for them all, with one single exception, the reason for which, we think, is satisfactorily explained by the evidence, in the same way, by the purchase of stock, and placing it in their names. The bank and John Creed both treated the stock as belonging to the persons in whose names it stood. The children voted on it, sometimes personally, and sometimes by [11 proxy. The dividends on stock were always placed to their credit on the books of the bank; the certificates of stock were issued in their names by the bank, certifying that each was entitled to the amount of stock that stood in their names; the stock was talked of in the family as belonging to the children, and John Creed so spoke of it to his friends and neighbors. The bank claimed a lien on the stock standing in the name of John M. Creed as late as 1840, for a debt which he owed it. The directors of the bank, who had the best means of knowing, and who were most interested in knowing what was the true state of fact, gave a most specific dec-

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laration in 1841 that the stock was a bona fide advancement to the children. Some facts are, however, relied on by the bank to rebut the conclusions that might be drawn from these transactions. One is that John Creed always drew the dividends on this stock, even after the children had come of age, and some of them were acting for themselves. And another is that John Creed spoke to White, one of the witnesses, about this stock as helping to pay his debts to the bank.

As to the first; the fact that John Creed always drew the dividends on this stock. Unexplained, it is certainly an item of evidence having some weight; but when we reflect that John Creed, as officer of the bank, knew of all its operations when they took place; that he was a large stockholder himself; would be drawing his own dividends; that several of these persons lived with him, and some of them resided abroad, we do not think it strange that he should have made a practice of drawing for all of them when he drew for himself. Nor do we consider the fact that he did not give a specific account of the money thus drawn, or pay it over, inconsistent with the idea that it was a provision made for the benefit of his family. This provision, from its very nature, was intended, as such provisions generally are, for future, rather than immediate benefit to the parties for whom it was made. As to the other circumstances of John Creed speaking of this stock to White as a fund that would help him to pay his debts to the bank: White, between whom and John Creed a long confidential acquaintance had existed, speaks of John Creed as often speaking of this stock as a provision that he had made for his family. He says, on cross-examination, that he once, or perhaps oftener, heard Creed speak of this stock as an item which, with his real estate, would enable him to pay off the bank debt. Now this apparent contradiction in the statements of Creed is all explained, if we suppose that the children were willing at his suggestion, to give up their stock to relieve him from his embarrassments. And we are not without proof on this subject; for it appears that four of the children did offer to the bank an assignment of their stock as a pledge for their father's debts, which the bank refused, on the ground that the stock belonged to John Creed. We think, in the absence of any apparent motive on the part of John Creed to put his property out of his hands, the most reasonable deduction, from all the facts of the case, would be that

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his motive in reference to this stock was to make a provision for his family.

It is said, however, that the case stands differently with the Smiths. They were brothers-in-law of John Creed; he was not legally bound to provide for them, nor is it customary for a man to make provision for those thus related to him. Still, between John Creed and the Smiths, or one of them at least, that relationship was held nearer than it generally is. As has been before stated, this stock was taken in their names in 1816. The Smiths were then boys. James H. Smith had been living with John Creed for about four years, and continued to live with him during his life, with the exception of about two years. During all this time, from 1812 to 1828, no account was ever taken of wages; but Smith lived and did business for Creed, who supported him. On the death of James H. Smith, in 1830, John Creed took his infant daughter to his house and raised her in his family as his own child. The other Smith, Benjamin, in 1816, was at college, and has been absent from the state for many years.

*These boys were poor. It appears that John Creed administered on the estates of both their father and mother, and that there was not a cent of property that ever came to them from these estates. During the existence of the bank, for nearly thirty years, this stock stood in their names and was treated by the bank as belonging to them; it was taken by Creed contemporaneously with the stock taken for his wife and children, and must be considered as having been set apart for the same purpose.

But we have been looking at this evidence as if John Creed had no motive in putting his property out of his own name, if he continued the owner. But it is said by the defendants in review that John Creed put the stock in the names of these persons for the purpose of evading the charter of the bank. The charter provides that a stockholder in the bank for the first ten shares of stock shall have one vote for each share, for the next ten one vote for every two shares, and so on, decreasing the vote on each share as the number of shares increases: so that the stock, subdivided as it was, would be entitled to ninety-five votes; whereas, if it had all stood in the name of John Creed, it would have been entitled to but twenty-eight votes. Now this might be an inducement for John Creed to thus divide his stock. It would, however, be a fraud on the charter of the bank, as well as on the other stockholders. But

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when the directors and attorneys of the bank, some of them distinguished for their general, as well as their legal knowledge, who were the neighbors of John Creed, were acquainted with his acts and character, and with his pecuniary affairs, who were bound, both in law and conscience, to see that no fraud was committed on the charter of the bank, or its stockholders, were unable, during the whole existence of the bank, to discover that such a fraud was being perpetrated, how can they expect that this court, with its comparatively small means of ascertaining the true facts of the case, can infer such fraud? It is to be remarked that no new fact has come to light in reference to this matter. But suppose they did 14] know that such a fraud was being *perpetrated; and then, how stands the matter? Why the bank then acquiesced in the deception and gave its sanction to it in every possible form. Not a book in the bank, scarcely, but contained false entries, covering up and effectuating the fraud. Can the bank now come in and show the fraud, and derive any benefit by such showing? We think not. When the bank has run its course; when John Creed, too, has finished his, and, stripped of all his property, is about lying down to die, it is too late to come in and disclose this fraud, if there be one, merely for the purpose of wresting from John Creed's family this small remnant of his once large possessions.

But it is said that, so far as the twenty shares standing in the name of Margaret D. Creed are concerned, the decree must stand, on the ground that the complaints in review are not prejudiced by it. As we have before seen, Margaret D. Creed died in 1823, and no administrator was appointed. She was not represented in this suit; the court had not jurisdiction to decree in reference to this stock, unless on the ground that her children, who were parties, were the persons in interest. From the evidence and parties before the court, the complainants, who are the children of Margaret D. Creed, appear to have an interest in this stock, and are, therefore, prejudiced by the decree. Margaret Creed, the daughter, now Margaret Parks, as is disclosed by the evidence, claims this stock. She is not, however, a party to this suit, and her rights, as against the other children, can not now be considered. It is also claimed that the decree, so far as the stock formerly belonging to John M. Creed is concerned, must stand on account of the assignment to John Creed and his assignment to the bank. The evidence shows that William P. Creed had paid debts for John M. Creed previous

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to 1840, amounting to over \$2,000—more than the amount of the stock; that John M. Creed assigned to William P. Creed this stock as an indemnity; that William P. Creed went to the bank and asked to have the stock transferred to his name, and that the cashier refused, on the ground that John M. *Creed was in- [15] debted to the bank. John M. Creed afterward, without consideration, transferred this same stock to his father, John Creed, who had full notice of the transfer to William. John Creed had the stock transferred to his name on the books of the bank.

Now the bank had, by the provisions of their charter, a perfect right to hold this stock for any debt that they might have against John M. Creed at the time of the transfer to William. The transfer to William, however, vested in him the title to the stock, subject merely to the bank debt. If the bank was claiming this stock for the debt that existed against John M. Creed at the time of the transfer to William, its claim would be good; but the bank is claiming it under John Creed, senior, for the payment of their claims against him.

The fact that the complainants in review are in default for answer to the supplemental bill, is relied on for sustaining the decree. It is evident that the new charges contained in the supplemental bill did not enter into the decree; the whole finding and decree of the court are perfectly contradictory to all those charges.

The decree of the Supreme Court will, therefore, be reversed, except as to the fifty shares originally in the name of John Creed, and the four shares in the name of John Manis, and the cause will be remanded to the District Court of Fairfield county for further proceedings.

THURMAN, J., having been of counsel, did not sit in this case.

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A license to keep a tavern under the authority of the act granting licenses and regulating taverns, passed June 1, 1831, was a licence, according to the true intent and meaning of said act, to retail liquors as well as to keep a tavern.

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The act to restrain the sale of spirituous liquors of March, 1851, did, by its operation, repeal the act of June, 1831, so far as it conferred the authority to grant licenses in future to retail liquor, but did not, by any express language, revoke or annul the outstanding licenses which had been granted under the act of 1831, and had not expired at the time the former act took effect.

Connected as the subject is with the public police and domestic regulations of the state, the legislature had the power, on the ground of protecting the health, morals and good order of the community, to revoke or provide the mode of revoking the unexpired licenses granted under the act of 1831; but the exercise of this power, without refunding the money obtained for the license, would be an act of bad faith; and as repeals by implication are not favored, and penal statutes are strictly construed, such an operation will not be given to the law by mere implication, in the absence of words directly and clearly expressive of such intention.

It is not correct practice to plead specially to an indictment a matter which is competent and proper, by way of defense, under the plea of not guilty; but if the state demur generally, or take issue on any such special plea, the irregularity is thereby waived.

If a special plea to an indictment be determined to be insufficient, the judgment of the court should be *respondeat oster*; as in this state the court could not proceed to final judgment in a criminal case without either a plea of guilty or a finding by a jury.

A negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment, unless the matter of such exception or proviso enter into and become a part of the description of the offense, or a qualification of the language defining or creating it; but as the exception of the sale of liquor for medicinal and pharmaceutical purposes in the proviso in the first section of the law of 1851, to restrain the sale of liquor, points directly to the character of the offense, and becomes a material qualification in the statutory description of it, an indictment under this section is defective without the negative averment.

ERROR to the Court of Common Pleas of Ross county.

The plaintiff in error was indicted in the Common Pleas for selling spirituous liquor on the 2d day of May, 1851, by less quantity than one quart, under the provisions of the act of the General Assembly entitled "an act to restrain the sale of spirituous liquors," passed March 12th, 1851, 49 Ohio Laws, 87; Curwen's Rev. Stat., chap. 1073—which by its terms did not take effect until the 1st day of May of the same year.

To this indictment, the plaintiff in error put in a special plea, setting forth, that before the enactment of the said law, he had ob-

tained from the Court of Common Pleas of the county, under the authority of the act granting licenses and regulating taverns, passed June 1st, 1831, a license authorizing him to keep a tavern, at his house in Chillicothe, with the *privilege of retailing spirituous [17 liquors for one year from the 13th day of October, 1850; that the license had been issued, and that he had paid therefor fifteen dollars into the county treasury; that the sale of liquor alleged in the indictment was made by him at his tavern while said license was in full force, and claiming that he was exempt from the provisions of the act of 1851 until the expiration of his license.

To this plea the state demurred. The court below sustained the demurrer, and thereupon, in the language of the record, "the defendant not asking leave to plead *de novo*, but abiding by his said plea," the court gave judgment and assessed a fine, together with the costs of prosecution, upon the plaintiff in error. And it is to reverse this judgment that this writ is prosecuted.

J. L. Green for plaintiff in error; *J. McCormick* and *Wm. McClintock* for defendant in error.

BARTLEY, J. The errors assigned are substantially as follows:

I. That the court erred in sustaining the demurrer to the plea.

II. That the court erred in pronouncing judgment without a plea of guilty, or a finding of a jury.

III. That the indictment was insufficient.

The first and most prominent question presented in the case is that of the sufficiency of the ground of defense set up in the special plea.

The question of the validity of the act to restrain the sale of spirituous liquors, passed March 12, 1851, is not raised; but the inquiry is presented, whether the effect and operation of the act was to revoke or annul the authority to retail spirituous liquors granted to tavern-keepers by licenses which had not expired when the act took effect.

The right to keep a tavern or to retail spirituous liquors is a right which every person in a community could exercise, if not restrained by penal enactments. The fifteenth section of the act granting licenses and regulating taverns, passed June 1st, 1831, prohibited by a forfeiture or penalty, recoverable by indictment, any person who is not duly licensed to keep a tavern, from follow- [18 ing the business either of keeping a tavern or of retailing spirituous liquors. The same act authorizes a license to be granted to

certain persons to keep tavern, and prescribes the terms and regulations for granting the same for the period of one year.

It is insisted upon for the state, that the license authorized by this law, being simply a license to keep a tavern, did not carry with it the authority to retail spirituous liquors. In other words, that the licensed tavern-keeper was not licensed by the authority of law to retail spirituous liquors; but was simply favored, by an exemption in the law, from the penalties imposed on the rest of the community for retailing spirituous liquors. It is the opinion of the majority of the court that this distinction is not warranted, and that, according to the true intent and meaning of the law of 1831, the license to keep a tavern carried with it and conferred the privilege of retailing spirituous liquors as clearly as if the same had been positively expressed.

The same act which imposed the restraint on the community at large authorized the license. The restraint was alike upon the business of keeping a tavern, as well as upon that of retailing spirituous liquors. And the license in fact conferred the authority to exercise all the acts prohibited by the penal provision of the law. It is apparent, from the context of the law and its evident reason and intent, that the license conferred the privilege of retailing spirituous liquors as clearly as that of keeping a tavern. Such has been the construction uniformly recognized, and such the common understanding in the execution of the law; and the privilege of retailing spirituous liquors has been an important consideration, and in many instances the only consideration for which the license has been obtained.

In construing a statute, words are to be taken in the sense in which they are ordinarily understood. The term tavern-keeper has for many years past been understood to import a person licensed to retail liquor at a house kept by him for public entertainment. Webster's Dictionary defines a tavern to be "a house licensed to sell 19] liquors in small quantities *to be drank on the spot. In some of the United States, tavern is synonymous with inn or hotel, and denotes a house for the entertainment of travelers, as well as for the sale of liquors, licensed for that purpose." A license to keep a tavern, therefore, in its ordinary signification, was understood to be a license to retail liquors and keep a house of entertainment. The amendatory act of February 25, 1833, authorizing a license to keep a tavern, without retailing liquor, requires a special exception

of the business of retailing liquor in the license. Without this exception, a license to keep a tavern conferred the authority to retail liquor as a material part of the privilege granted.

In the case of *Curtis v. the State of Ohio*, 5 Ohio, 199, the Supreme Court of this state was equally divided on the question whether a public house of entertainment in which no liquor was kept was a tavern at all, in the meaning of the law, so as to be required in any instance to obtain a license. This division of the court led to the passage of the explanatory act of February 24, 1834, which expressly declares that no person, except persons who may reside in cities, towns, and villages, or within one mile thereof, shall be deemed or taken to be a keeper of a tavern, in the true intent and meaning of the aforesaid fifteenth section of the act of June, 1831, who does not keep spirituous liquors for sale in his house of entertainment.

It was clearly the intention of the act of 1831, that the authority to retail liquor should be conferred by the license to keep a tavern and constitute a material consideration in procuring it.

If the plaintiff in error, therefore, had the license to retail spirituous liquors, granted to him under the authority of law, as he alleged, did the act to restrain the sale of spirituous liquors, passed in 1851, revoke or annul it, so far as it conferred this privilege? The repealing clause of the act is in these words: "All laws, or parts of laws, licensing the sale of spirituous liquors, which are inconsistent with the provisions of this act, be and the same are hereby repealed." *This repealing clause affects nothing but [20 the power to grant licenses in future after the law took effect. It repealed the authority, in the law of 1831, to grant any more licenses to retail spirituous liquors, but nothing further. There is no language employed expressive of any intention to revoke or annul the unexpired licenses previously granted under it. The license was a privilege, an acquired right, which, during its term, was not dependent on the continuance of the law under which it had been granted. If a license had been granted and taken out to keep a tavern under the act of 1831, on one day, and the next day the entire law had been repealed, it could not be claimed that the license to keep a tavern was revoked. The repeal of the law would simply take away the authority to grant future licenses. It is clear, that the unexpired licenses were not expressly repealed or revoked by the act of 1851. And it is but fair to presume, that if the gen-

eral assembly had intended any such thing, such intention would have been expressed, and provision made for refunding the money obtained for the licenses revoked.

It is well-settled that several acts *in pari materia*, and relating to the same subject, are to be taken and comprised together in construing them; because they are considered as having an object in view, and as acting upon one system (*Rex v. Laxdall*, 1 Burr. 447). Chancellor Kent says: "The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred that a code of statutes relating to one subject, was governed by one spirit and policy, and was intended to be consistent and harmonious." 1 Kent's Com., 463.

The case of *Dodge v. Gridley*, 10 Ohio, 177, appears to bear a strong analogy in principle. Certain rights had been acquired under the act regulating estrays, passed in 1831, by which persons living out of the limits of towns or villages were entitled to have their animals running at large exempted from liability to be taken up and dealt with under the authority of the town corporations. 21] And the charter of *the town of Harmar, passed in 1837, conferred full power and authority upon the town council to prevent any description of animals from running at large in the streets, etc.; and it was claimed that, being subsequent in date to the stray act, it repealed the latter so far as it extended to that town.

The court in this case say: "Repeals by implication are not favored. When two affirmative statutes exist, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation. If they admit of being applied to different subjects, there is no necessity of supposing an implied repeal." There are many cases illustrative of this principle, especially that reported in 9 Cowen, 437. The statute of wills in New York prohibits a devise to a corporation. A subsequent act incorporating the orphan asylum society declares that they may purchase real estate. The court held that the statute of wills was not repealed by the act of incorporation; for, although the word purchase, in its most extensive signification, includes a devise, yet, inasmuch as the right claimed is by the statute of wills expressly denied, it would seem to be more congenial to the spirit of both acts, to understand the word purchase in a restricted sense, and as so intended by the legislature.

The court is not disposed to question the power of the legislature in a matter of this kind, connected as it is with the public policy and domestic regulations of the state. Upon the ground of protecting the health, morals, and good order of community, we are not prepared to say that the legislature does not possess the power to revoke such license. But where there has been no forfeiture of the license by abuse or violation of its terms, common honesty would require that the money obtained for it should be refunded in case of its revocation.

The act of March 12, 1851, did not, by its terms, take effect till the 1st of May of that year, up to which period licenses could have been granted under the law of 1831. It is not reasonable to presume that the legislature would, *after authorizing a license, [22 and allowing the granting of it till a particular period, and after obtaining thereby the payment of many thousands of dollars into the treasury, revoke the license before the expiration of the term for which it was granted, without reimbursement. At least the court will not presume any such act of bad faith, from mere implication. If any such power be exercised, it must be clearly and distinctly expressed in the law.

It is said that the policy of the act of 1851 was to put an end to all retailing of ardent spirits. But this does not affect the question. The licenses were but temporary, and of short duration; and if not revoked, only gave the statute a more gradual effect in going into operation.

It is insisted, on the part of the state, that the language of the statute, which is general, providing, "that if any person shall sell, etc., each and every person so offending shall be deemed guilty of a misdemeanor, etc., gives it a peculiar effect. This, however, is nothing more than the ordinary language employed in almost all penal enactments. The mere letter of the law is not always to be adhered to. It is well settled that penal statutes must receive a strict interpretation, and must not be extended in their operation beyond the manifest intention of the legislature. The subject-matter and the reason and effect of a law must be looked to in giving it a construction; and where words, if taken literally, bear an absurd and unreasonable signification, there may be some deviation from the ordinary sense. The Bolognian law, mentioned by Puffendorf, which enacted that whoever drew blood in the street should be punished with the utmost severity, was held not to extend to

the surgeon who opened the vein of a person who fell down in the street with a fit. The authorities are numerous settling the principle that statutes in derogation of the rights either of the public or of individuals are not to be enforced by a strict adherence to their letter; but must be so construed that no man who is innocent be punished or damaged; and no statute should be so construed as to 23] render it unreasonable *or iniquitous in its operation. Bacon Ab. title Statutes, 1, 9, 10; 2 Bos. & Pul., 496; Sprague v. Birdsall, 2 Cowen, 419.

This ground of defense to the indictment would have been competent and more properly introduced under the plea of not guilty. Such special matter of exemption can not be regularly set up by special plea. 1 Saunders, 309; 1 Chitty's Cr. Law, 473. But the state having waived the irregularity by demurring to the plea, it is the opinion of a majority of this court that the Common Pleas erred in sustaining the demurrer.

The second assignment of error noticed is that the Common Pleas proceeded to judgment and passed sentence without a plea of guilty or a finding by a jury. We are unanimous in the opinion that in this particular the Common Pleas erred. After sustaining the demurrer to the special plea, the judgment of the court should have been *respondeat ouster*. In a criminal case in this state a defendant can not waive a jury trial in any other way than by a plea of guilty. And a plea of special matter set up by way of avoidance found insufficient could in no instance be treated as such an admission of the legal quality of the guilt deducible from the indictment as to answer the purpose of a plea of guilty.

It may be important to notice the question of the sufficiency of the indictment, for the purpose of settling a rule of pleading in regard to which the authorities are not clear and somewhat conflicting. This question is now relied on by the plaintiff in error, although not raised in the Common Pleas.

It is claimed that the indictment is defective on the ground that it does not contain a negative averment that the sale of spirituous liquor charged was not for medicinal or pharmaceutical purposes. The penal offense is described or defined in the first section of the act of 1851, and at the close of the section is a proviso in these words: "Provided that nothing contained in this section shall be so construed as to make it unlawful to sell any spirituous liquors for medicinal and pharmaceutical purposes."

*The rule laid down in the authorities on this subject is [24 generally defined in this manner: that when a criminal or penal statute contains an exception in the enacting clause, that exception must be negatived in the indictment; but where the statute contains provisos and exceptions in distinct clauses, it is not necessary to allege that the defendant does not come within the exceptions nor to negative the provisos. 1 Chitty's Crim. Law, 284. In some of the authorities the negative allegation is made to depend upon the place in the statute where it occurs, 1 Term R., 141; in others upon the question whether the exception or proviso qualifies the description of the offense. In some, the rule is made to depend upon whether the exception be a matter of description in the negative, the affirmative of which would be a good excuse for the defendant, 2 Hawk. 255, 112; while in others it is made to depend upon the distinction between a proviso in the description of the offense and a subsequent exemption from the penalty under certain circumstances. This is Lord Mansfield's rule in *Spiers v. Parker*, 1 Term R., 86, 87.

The confusion which seems to exist in regard to this rule has arisen from the various modes adopted and the indefinite language used in defining it, and the multiplicity of forms in which exceptions, qualifications, and exemptions are introduced into statutes. What constitutes the enacting clause in the meaning of some of the authorities is not clear. A clause is a distinct member or subdivision of a sentence, in which the words are inseparably connected with each other in sense, and can not, with propriety, be separated by a point; yet very frequently the language creating and describing the offense and fixing the penalty includes several distinct clauses and sometimes a whole section.

It is requisite that every indictment should contain a substantial description of all the circumstances descriptive of the offense as defined in the statute, so as to bring the defendant precisely within it. And the only substantial reason for requiring this negative averment at all is that, without it, the description of the offense would not be *complete. When, therefore, the matter of the [25 proviso or exception in the statute, whether it be embraced within what has been termed the enacting clause or not, enters into and becomes a part of the description of the offense, or a material qualification of the language which defines or creates the offense, the negative allegation in the indictment is requisite. But where it is

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a subsequent exemption, or occurs in a separate and distinct clause or part of the statute, disconnected with the statutory description of the offense, the negative averment is unnecessary.

In the case before the court, the matter of the proviso in the first section of the act of 1851, points directly to the character of the offense, is in the same sentence with it, and made a material qualification in the statutory description of it.

It is the opinion of the majority of the court that the indictment should have contained the negative averment, that the sale of the liquor was not for medicinal or pharmaceutical purposes, and is, therefore, defective.

The judgment of the Court of Common Pleas is reversed.

THURMAN, J., having been of counsel for the plaintiff in error, did not sit in this case.

RANNEY, J., dissented from the opinion of the court as to the sufficiency of the ground of defense set up in the special plea, but concurred in the reversal of the judgment on the other grounds.

CORWIN, J., dissented from the opinion of the court as to the sufficiency of the indictment, but concurred in the decision on the other points.

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*GEORGE WETMORE v. ANNE MELL.

Where an act of a party is admissible in evidence, his declarations, at the time, explanatory of that act, are also admissible, as a part of the *res gestæ*.

Where A's promise to marry B. is shown, evidence that B. had received A's attentions for four years, and prepared for marriage by procuring bedding, etc., and of B's statements to her sister, at the time, explanatory of such acts of preparation, is competent to show her acceptance of such promise. Declarations of the party, made after suit brought, or after a rupture between the parties, would be clearly inadmissible, but it will not be presumed that the court below admitted such declarations, unless it appear from the bill of exceptions.

THIS is a writ of error to the Court of Common Pleas of Mahoning county, reserved to the late Court in Bank.

The plaintiff below declares for a breach of defendant's promise to marry her; to which a plea of the general issue is interposed, and at the May term, 1851, of said court, the cause was submitted

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to a jury, who returned a verdict in favor of the plaintiff for the sum of \$1,458. The defendant moved for a new trial, for the following reasons:

First. That the court erred in charging the jury that the plaintiff could give in evidence her own declarations to prove the mutuality of the marriage contract, claimed by the plaintiff in the case, or a contract on her part.

Second. That the verdict of the jury is against the law and evidence in the case.

Third. Because the damages are excessive.

Which motion was overruled by the court. And the plaintiff having remitted \$658 of the verdict, judgment was rendered in favor of plaintiff for \$800 and costs.

The bill of exceptions shows that the plaintiff, "to maintain the issue on her part, introduced, together with other facts, evidence tending to show that the defendant had kept her company from three to four years, that the plaintiff and defendant were mutually attached to each other, and that the plaintiff had made some preparations for marriage, by getting bedding, etc.; and then the plaintiff offered evidence of her own declarations made to her sister during the preparations, in the absence of the defendant, in order to show the *mutuality of the contract, the plaintiff's counsel [27 claiming that, from the facts and circumstances proven, a promise on the part of the defendant might be inferred. The defendant, by his counsel, objected to the declarations of the plaintiff, for any purpose. But the court overruled the objection and admitted the declarations of the plaintiff, not for the purpose of proving the contract of marriage, but for the purpose, if the jury were satisfied that a contract had been proven on the part of the defendant, of showing the mutuality of the contract."

Upon which the defendant below has assigned the following errors:

I. That the court erred in permitting said evidence to go to the jury.

II. That the judgment is manifestly against the evidence in the case.

III. The judgment was for plaintiff when it should have been for defendant.

Wilson & Church and John Hutchins for plaintiff in error.

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Birchard, J. L. Ranney, and Newton & Estep for defendant in error.

CORWIN, J. As the evidence on the trial below is not presented in the record, the second error assigned presents no question for our consideration.

The third error assigned depends upon the determination of the first, no other exception to the judgment being taken, and we are brought to the question, whether the court erred in admitting the declarations of the plaintiffs, under the circumstances, and for the purposes stated in the bill of exceptions.

It is undoubtedly true, as a general rule of evidence, that the statements of a party in regard to the subject-matter of his own suit are inadmissible, unless introduced by his adversary; but this rule is necessarily subject to many exceptions, and the admission or rejection of such testimony must in some measure depend upon and be governed by the nature of the case, and of the facts to be 28] proven. Thus, it has been *frequently held, that when one enters into land, in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin, or the like; or where one changes his residence, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself, or does any act material to be understood, his declarations, made at the time of the transaction, and expressive of its character, motive or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof, like any other material facts, leaving their effect to be governed by other rules of evidence. 1 Greenl. Ev., sec. 108, and authorities there cited. So the state of mind, sentiments, or disposition of a person, at any particular period may be ascertained from his declarations and conversations at that time. 2 Hill. 248, 257.

And no objection can exist to the admissibility of such evidence, so long as the statements and declarations thus introduced, are concomitant with, and explanatory of, the act or occurrence to which they relate. In *Sessions v. Little*, 9 N. H. 271, it is held that, "where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give character to the act, and which may derive a degree of credit from the act itself, are also admissible as part of the *res gestæ*." But the reason of this rule by no means applies to such statements as are

merely narrative of a past occurrence, and they are clearly inadmissible.

In the case under consideration, the plaintiff's acts of preparation for the marriage were not objected to, and were properly admitted as evidence of her acceptance of defendant's promise to marry her. And why exclude her statements at the time, explanatory of such acts of preparation? The latter are no more likely to be deceptive than the former, but are the more reliable and satisfactory, because they are a distinct, express, and binding admission of what would only be otherwise ascertained by inference from unexplained acts.

*Such statements, if made, after a rupture between the parties, for obvious reasons, would be inadmissible, but the plaintiff in error has not shown by his bill of exceptions that the declarations so admitted, were made at such a time, or under such circumstances, and in the absence of such showing we will not presume that the court below admitted such improper declarations. We can only correct such errors as are made to appear.

It is contended by counsel for plaintiff in error, that the statements of the party were admitted by the court to show the "mutuality of the contract," and that as mutuality is an essential element of every contract, evidence to establish the mutuality is evidence to establish the contract itself, and that it was therefore improperly admitted. The language by which the object of the evidence is expressed in the bill of exceptions may not be of the happiest selection, but the principle involved is quite clearly shown, and we do not stop to deal with the words in which it is set forth. The defendant's promise was shown by other distinct facts and circumstances, and it was proposed to show plaintiff's acceptance of it, by her preparation for marriage, together with her statements to her sister, explanatory thereof, and for this purpose only was the evidence admitted by the court. The cases of *Hutton v. Mansell*, 6 Mod. 172, and *Peppinger v. Low*, 1 Halst. 384, are in point, and fully sustain the decision of the court below. The rule of evidence there established for this description of cases is so reasonable in itself, and the reasons by which it is maintained are so consistent with the habits and customs of society, and the obvious proprieties of life, and have for so long a time secured the sanction and approval of courts of justice, that we are unwilling to disturb it. And when we consider the peculiar nature of the contract thus sought

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to be established, and the circumstances of secrecy and confidence with which it is usually made and observed in civilized life, such acts and declarations as were admitted in evidence in this case are frequently the only, and ordinarily the best and most satisfactory 30] evidence of the *existence of such an engagement. We are unanimous in the opinion that there was no error in the ruling of the court below, and its judgment is therefore affirmed with costs.

RANNEY, J., having been of counsel, did not sit in this case.

EX PARTE DAVID A. BLACK.

The right to determine when a court-house, jail, and public offices shall be erected by a county, is vested in its commissioners. They must provide a court-room, jail, and offices; but they need not be buildings erected expressly for the purpose.

The act of January 28, 1851, does not limit the discretion of the commissioners of Hamilton county in these particulars.

Nor are they deprived of their discretion by the contract made by and between them and the Messrs. Cook for the building of a particular court-house and jail.

A lawful discretion vested in an individual, officer, or corporation, can not be destroyed or limited by the writ of *mandamus*.

It is equally well settled that, before the writ will be issued to either, a plain dereliction of duty must be established.

THIS is an application for a writ of *mandamus* to the board of county commissioners of Hamilton county. In support of it an affidavit of the relator, David A. Black, and sundry exhibits therein referred to were read.

The affidavit states that the relator, ever since October 23, 1850, has been and now is one of the commissioners of said county. That by the laws of Ohio, it is the duty of said commissioners to provide a good and sufficient court-house and jail, and good and convenient fire-proof buildings, in which shall be kept the offices of the clerks of courts, sheriff, recorder, auditor, and treasurer; to be formed of such material and of such dimensions, and on such place or places as the commissioners may direct at the seat of justice.

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That, by an act of the general assembly, passed January 28, 1851, entitled "An act to authorize the commissioners of Hamilton county to erect public buildings," said commissioners *and [31 their successors in office were authorized to erect all such suitable and necessary buildings for said county upon the same place or lot of ground then known as the "old court-house property," in the city of Cincinnati, upon such plan and of such materials as to them should seem proper.

That by the fourth section of the said act, commissioners were authorized to appoint a superintendent of such public buildings as they might determine to erect; to fix his compensation, and dismiss him at pleasure; and it was further thereby provided, that said commissioners should make all necessary arrangements and contracts for the work and materials to be furnished for said public buildings, require the faithful performance of all contracts in relation to the same, issue orders to the county auditor for the payment of all moneys due for work and materials furnished, and superintend the whole business to its completion. That before entering into any contract for the erection of any of the said buildings, they should give at least twenty days' notice in at least four of the daily newspapers published in Cincinnati, that proposals would be received at the auditor's office for the erection of said buildings, according to plans and specifications to be prepared for that purpose, and, upon opening such proposals, should award the contract or contracts to such person or persons as they might deem the lowest and best bidders.

That, before the passage of this act, the court-house in said county had been burned down, and the county did not own any building in which the courts could be held.

That, pursuant to the act, said commissioners, in February, 1851, appointed one Isaiah Rogers superintendent, and fixed his compensation at two per cent. on the entire cost of the buildings; which appointment he accepted, and, by direction of the commissioners, made out plans, elevations, and specifications for a court-house and jail, which they approved. That thereupon the commissioners gave the requisite notice for building proposals for said court-house and jail, according to said plans, etc. That proposals were received *and opened; and, on July 5, 1851, the contract was [32 awarded to Milton H. Cook and Alfred M. Cook, partners, at the sum of \$695,253.29; that is to say, for the court-house, \$468,732.55,

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and for the jail, \$226,520.74; these being the lowest and best bids. That said award was duly recorded in the journal of the commissioners, and the contracts afterward reduced to writing and signed by said Cooks and by Richard K. Cox, and D. A. Black, the relator, two of the commissioners, a copy of which, dated July 15, 1851, is annexed to the affidavit. That by said contract it was, among other things, stipulated that the buildings should be commenced immediately and progressed with, with all reasonable speed, and to be completed by May 1, 1855. And that the commissioners should have the right to change the plan or manner of the buildings, either as to material or style of finish; and if the cost of labor and materials should be thereby increased, a suitable increase of compensation should be allowed; if lessened, a suitable deduction should be made; but if the cost were materially reduced, the Cooks should be entitled to a suitable compensation for the alteration.

That the Cooks immediately commenced the excavation for the foundation of said court-house and proceeded to lay the same; that they made due and satisfactory progress in the work, and by November 4, 1851, had nearly completed the foundation, and had also expended large sums of money in preparing machinery, steam engines, etc., to proceed rapidly with the undertaking.

That, at the October election, 1851, Jesse Timanus was elected commissioner, in place of said Cox, and was duly qualified and sworn into office; after which, on November 4, 1851, Timanus and John Patton, another of said commissioners, without any excuse therefor, and without the assent and against the wish of the relator, ordered said Cooks to cease any and all further proceeding on the contract, and to cease work on said buildings, and claimed the right to repudiate the contract, and under pretense of such right, 33] *gave the order aforesaid, and yet refuse to permit the contractors to erect said buildings or either of them.

That the public interest requires the erection of said buildings, that there is not, at this time, any sufficient safe depository for the public books and papers of the county, or for keeping the records of the courts of said county; and that the county will also be held responsible to said Cooks in damages for a violation of the contract; which relator believes will amount to a very large sum of money; all which will be saved to the county if the commissioners discharge their duty as required by law.

Upon the case thus made, the court were moved to allow a writ

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of alternative *mandamus*, commanding the commissioners of the county to proceed with the erection of said court-house and jail, under and pursuant to the contract aforesaid, or show cause for their refusal; or, if such writ could not be granted, that a writ might issue, commanding them to erect a court-house and jail, or show cause why they fail to do so.

Fox and Pugh, Attorney General, in support of the motion cited: Swan's Stat. 740; 49 Ohio L. L. 130; 12 Pet. 614; 2 Eng. Com. Law, 683; Wright, 126, 353; 9 Ohio, 28; 14 Ohio, 256; 19 Ohio, 125, 417; Angell & Ames on Corporations, 573, 579; 2 Pick. 414; 6 Cow. 518; 8 Parliamentary Cases, 329; 7 Cow. 526; 1 Cow. 377; 6 B. & C. 181; 1 Ired. 129; 2 Chitty, 254; 1 Barb. S. C. 35; 2 Id. 418; 10 Wend. 393; 23 Wend. 461; 4 Har. & McH. 430; 21 Pick. 229; 20 Wend. 660; 46 Ohio L. L. 267.

Gholson & Groesbeck, contra, cited: 3 Burr, 1267; Angell & Ames on Cor. 630; 1 Ired. 133; 1 Ala. 15; 12 Pet. 524; 3 How. 87; 25 Me. 291, 295; Ired. 430; Doug. 526; 2 Hill, 47; Angell & Ames on Cor. 527.

THURMAN, J. The statute of 1831, entitled, "An act providing for the erection of public building," enacts, that there shall be erected and finished, in each county within this state, when- [34] ever the commissioners of the county may deem it necessary, a good and convenient court-house, a strong and sufficient jail or prison for the reception or confinement of prisoners and criminals; also, one or more convenient fire-proof buildings, in some convenient place or places near the court-house, in which shall be kept the offices of the clerk of the Supreme Court, Court of Common Pleas, sheriff, recorder of deeds, county auditor, and county treasurer; provided, however, that the commissioners may, at their discretion, provide and finish one or more suitable rooms within the walls of the court-house, or other building, for the use of the whole, or a part of the officers aforesaid; and the commissioners may assign such room or rooms to the sole and exclusive use of such officers as they may deem expedient." Swan's Stat. 740.

By the fifteenth section of the act establishing boards of county commissioners, passed March 5, 1831, it is provided, "That, until proper buildings are erected at the place fixed on for the permanent seat of justice in any county, it shall be the duty of the county

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commissioners to provide some suitable place for holding the courts of such county.

It is evident from these statutes that the right to determine *when* a court-house shall be erected by a county is vested in its commissioners. They must provide a suitable place in which to hold the courts, but it need not be a court-house built expressly for the purpose. They may rent a room or building to be used by the courts, until the time arrive when, in the exercise of a sound discretion, they resolve to erect, and do erect, a court-house. The same thing may be said of the public offices. In relation to these, the section first above quoted enacts that they shall be erected whenever the commissioners may deem it necessary, and the proviso declares that the commissioners aforesaid may, at their discretion, provide and finish one or more suitable rooms within the walls of the court-house, or other building, for the use of the whole, or a part of the officers aforesaid; and the commissioners may assign such room or rooms to the sole and exclusive use of such officers as they may deem expedient.

35] *Did the act of January 28, 1851, 49 Ohio Local Laws, 130, deprive the commissioners of Hamilton county of this discretion? We think not. It simply authorized them to erect public buildings, without destroying or limiting their power, conferred by the general laws aforesaid, to determine when they should be erected. It is clear, therefore, that if no contract had been made for the erection of a court-house, and the case stood upon the provisions of law alone, we could not properly order a mandamus to be issued, commanding a court-house or public offices to be built. To do so would be to usurp the functions of the county commissioners and deprive them of the discretion vested in them by law. We are not asked to grant a mandamus requiring the commissioners to provide suitable rooms for the courts and county officers. That would present quite a different question from the question whether we can command them to build a court-house and public offices. But were we so asked, no sufficient ground is laid for the application. There is no statement in the relator's affidavit or proofs that rooms for the courts and county officers are not provided. The only allegations that touch this point, even remotely, are contained in the affidavit, which states that the court-house has been burned, and that there is not at this time any sufficient, safe, depository for the public books and papers of the county, or for the keeping of the records of the

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courts. This may all be true, and yet no default on the part of the commissioners exist. It is not averred that they refuse or neglect to provide court-rooms, a jail and public offices. It is not even said that they refuse or neglect to build them. For all that appears to us, they may be industriously preparing to do so. The whole ground of complaint in the affidavit is, that they refuse to build a particular court-house and jail. It may be admitted that at the date of the affidavit the court-room and offices in use were not safe depositories of the public records, but where is the showing that this originates in a dereliction of duty on the part of the commissioners? There is no such testimony, and we can not presume it.

*And as to jail, it is not stated that there is no jail, or an [36 insufficient one, in the county; and if such is the fact, and the commissioners refuse or neglect to provide one, we must have the evidence before us in order to enable us to act.

Does the contract with the Cooks alter the case? We say nothing here upon the question argued at bar, "whether that contract is valid." Let its validity be assumed, for present purposes, what claim does it give the relator to the writ he seeks? If any individual right had been violated by its breach, it is the right of the Cooks, and they ask for no mandamus. Were they to do so, it would possibly be a sufficient answer to say that they have no right under the contract to any specific thing; that their whole compensation is to be in money; and that an action at law would afford them a plain and adequate mode of redress. But it is unnecessary for us to say what we would do were they the relators. It is sufficient that Black has no right to prosecute for them. The only ground upon which he can claim to stand is that of the public interest. But how do we know that the interest of Hamilton county requires the erection of the buildings contracted for? How can we say that her interest will not be promoted by putting an end to the undertaking, and paying the damages consequent upon such a course? And who has made us the judges of this question of her interest? But it is said that this is to sanction a repudiation of the contract by the commissioners. It is not so. It is only to say that mandamus is not the proper remedy. When a court of equity refuses to decree a specific execution of a personal contract, it gives no sanction whatever to its violation. It merely says, this is neither the proper forum nor the proper mode of relief. And so say we in the present case. When the general assembly shall have deprived the com-

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missioners of Hamilton county of their discretion, and *commanded* them to proceed with the erection of the buildings contracted for, a case will be made for mandamus if the command be disregarded. Until this take place, the decision of the question, whether these 37] particular buildings can be constructed, must *rest in the sound discretion of the commissioners and the people who elect them. In saying this we do not mean to decide that there is no case in which a right to a writ of mandamus may not grow out of a contract made in pursuance of statutory provision. We only mean to say that this is not such a case; that the commissioners in question have not been deprived of their discretion; and that, although that discretion is not an arbitrary one, its mere abuse, if such abuse exists, does not authorize us to exercise the discretion ourselves by issuing a writ of mandamus. It is too well settled, by reason and authority, to admit of denial, that the lawful discretion, vested in an individual, officer or corporation, can not be destroyed, or limited by the writ of mandamus. And it is equally well settled, that before the writ will go to either, a plain dereliction of duty must be established. Ang. & A. on Corp. 656, and cases there cited. Id. 662, 663 and 664, and cases there cited; 12 Ohio, 57; 1 Morris (Iowa), 35; 6 B. & C. 181; 9 D. & R. 309.

We see no sufficient ground for the present application, and it is therefore refused.

HARLEY BARTHOLOMEW v. BENJAMIN BENTLEY AND OTHERS.

Mere irregularities in organizing a corporation will not deprive the officers and stockholders of the protection of the charter, or subject them to private liability when sued as authorized bankers under the act of 1816.

But such organization to protect them must be *substantially* in accordance with the charter.

It is a well-settled rule that corporations are strictly limited to the exercise of such powers, and in such manner and by such agents as are provided in the charter creating them.

Directors of a bank elected in 1822, the bank being entirely insolvent and performing no corporate acts from that time until 1838, will not be held to have continued in office until the latter period, although the charter provided that they should continue in office until their successors were elec-

ted. On the contrary, so long a suspension from the performance of any official duty will be regarded as an abandonment or resignation of the office.

The act of such persons in appointing directors to fill vacancies in the board is entirely void, although the charter provided that a part of the directors of the bank might fill such vacancies.

*Where the charter provided that stockholders only should be elected [38 directors, persons having no interest in the stock, but fraudulently and collusively receiving the transfer of a share to qualify them, are not eligible; and the stockholders combining in such fraud have no power to confer upon them authority to do corporate acts.

Such fraud upon the charter, and combination to defraud the public, will prevent those participating in it from claiming any protection under its provisions to escape private responsibility.

The franchise of a corporation can not be impeached or inquired into collaterally; but an inquiry into the unauthorized and fraudulent acts of those claiming under such charter involves no such consideration, and is allowed.

THIS was an action of debt, tried in the Supreme Court, on the circuit, in the county of Wayne, at the September term, 1850, when a verdict was rendered for the plaintiff, and was reserved to the court in bank on a motion made by the defendants for a new trial.

The facts in the case sufficiently appear in the opinion of the court.

Harris, Cox and Dean, for the motion : *Spalding, Kirkwood*, and *Pardee*, contra.

RANNEY, J. The plaintiff was the holder of a large number of the notes issued by the German Bank of Wooster, mostly in the year 1838, and a few in the year 1840; and the defendants were officers in that institution at the time they were issued. This suit was brought under the act of 1816, to recover of them the amount of these notes as unauthorized bankers.

It was admitted upon the trial that the whole case turned on the point whether or not the defendants, in issuing said notes, were acting under the act of February 23, 1816, "to incorporate certain banks therein named, and to extend the charters of existing incorporated banks" (2 Chase Stat. 913), the fifteenth section of which incorporates "The stockholders of the German Bank of Wooster." From the mass of documentary and other evidence given by the plaintiff, it appeared that, soon after the passage of the act referred

to, the company was organized and continued to do a banking business until the year 1818, when it failed and became entirely insolvent. Its organization was, however, kept up by the election 39] *of officers, until the year 1822, when Robert Bentley and Thomas G. Jones, with eleven other persons, were chosen directors for one year; but it does not appear that they ever were qualified or accepted the appointment. From that time to the 23d day of July, 1838, a period of more than sixteen years, no corporate act or function was performed or attempted by either the directors or stockholders, or any part of them. At the organization of the bank, six thousand shares of stock, at twenty-five dollars each, were subscribed, and before its failure about eight dollars upon each share had been paid. At the time of its failure, the cashier was authorized to purchase, for the bank, its stock at a price not exceeding the nominal value, and in this way the stockholders paid large amounts of their indebtedness to the institution, exhausting all its resources, and leaving its circulation outstanding nearly worthless. Thus it remained without funds, and without any new election of officers, in a state of entire suspension for sixteen years. At the expiration of this period, for the most iniquitous and fraudulent purposes, as subsequent events fully demonstrate, Benjamin Bentley, M. D. and H. B. Wellman attempted to galvanize it again into life, and now insist upon the protection of its charter to shield themselves and their associates from private responsibility. The instruments employed for this purpose, in the first instance, were Thomas G. Jones and Robert Bentley, two of the board of directors chosen in 1822. At the date last named, they met, and, assuming that there were vacancies, filled the board of directors by the appointment of Benjamin Bentley and ten other persons, among whom were all the defendants. These ten persons, before the 15th day of July, 1838, were not the holders of any of the stock of the old bank; but, on that day, it appears, Benjamin Bentley, for the mere purpose of making them eligible as directors, transferred to each of them, without consideration, and without the knowledge of some of them, one share of the worthless stock then standing in his name. It fully appears from the transfer book that Thomas G. Jones was the holder of no stock in the bank after January, 1821. This 40] board *immediately commenced operations, and, among other things, authorized the cashier, B. Bentley, to dispose of the stock then held by the bank to any person who would pay the balance

due upon it; made requisitions for the payment of the stock by instalments; and finally issued a large amount of notes for circulation. Before this was done, however, Bentley had transferred to the Wellmans 3,413 shares of the stock, that had belonged to the bank, with the understanding that 1,563 shares should be transferred to himself, which was accordingly done. At this time the bank had not one dollar of assets. All that it ever received, with a trifling exception, came from Bentley and the Wellmans, and amounted to \$60,000, and is credited on the stock book under the date of August 14, 1838. This, they say, was made up of \$30,000 in specie procured in Cincinnati, and \$30,000 deposited with James Boyd & Co., of New York. In less than two months after this sum is credited to them, they had drawn out a much larger sum, and in July or August, 1839, the Wellmans transferred their stock to Bentley, who assumed their debt to the bank, which, with his own indebtedness, then amounted to over \$91,000, the whole of which Bentley paid, when the bank again suspended, by a transfer "of so much of his stock to the bank as would settle that amount." He says he "made a transfer of his stock to satisfy his own indebtedness to the bank to prevent suits from being brought against him, as a stockholder of the bank, by those who would thereafter obtain the notes and claims against it and pursue a persecuting course, particularly against him."

In short, they claim to have paid in on the stock held by them \$60,000, and confess that they drew from the bank and afterwards paid with this very same stock over 91,000 dollars; thus making a speculation of over \$31,000, while they left over \$125,000 of its circulation outstanding and nearly worthless. And to complete the wreck, the directors met on the 11th of September, 1841, and assigned to Bentley all the remaining property and effects of the bank. In January, 1839, it appears from the minute book of the directors that an election of officers was held, at which all persons *constituting the board at the July preceding, were chosen, [41 except Thomas G. Jones, whose place was filled by E. Gallagher.

At the conclusion of the plaintiff's evidence, the defendants moved for a nonsuit; but the motion was overruled. The court then charged the jury, in substance, that no informality in organizing under the charter could be taken advantage of to charge the stockholders as unauthorized bankers, but that there must have been a substantial organization. That filling the board, in 1838,

by one or two of the old directors chosen in 1822, would not affect such an organization, and that the attempted organization, in January, 1839, was illegal.

The reasons assigned for a new trial are:

First, that the court erred in refusing to nonsuit the plaintiff; second, in the charge as given, and the refusal to charge as requested; third, that the verdict is against the law and the evidence.

From what has already been stated, it is manifest that every question raised in this case will be solved by determining the legal effect of the attempted reorganization of the company, in July, 1838, and January, 1839. We concur fully with the judge who presided upon the trial, that mere irregularities in organizing under a charter, will not deprive the officers and stockholders of the corporation of its benefit, nor make them privately responsible. While, on the other hand, it is equally clear that, to entitle them to such protection, the provisions of the act of incorporation must be substantially pursued. No principle of law is, at this day, better established or supported by stronger reason than that "a corporation is strictly limited to the exercise of those powers which are specifically conferred upon it. The exercise of the corporate franchise being restrictive of individual rights, can not be extended beyond the letter and spirit of the act of incorporation." 4 Pet. 152; *Bank of Chillicothe v. Swayne*, 8 Ohio, 286.

We will first inquire into the legal effect of the attempted re-
42] organization of the bank by Robert Bentley and Thomas *G. Jones in July, 1838. This power is claimed under the twentieth and thirty-second sections of the act before referred to. By the first of these sections it is provided that thirteen directors shall be annually elected, on the first Monday in January in each year, "and each director shall be a stockholder at the time of his election, and a resident within the State of Ohio, and shall cease to be a director if he should cease to be a stockholder or to be a resident within this state." And it was further provided by the same section that, "if any vacancy shall at any time happen among the directors of any of the aforesaid banks, by death, resignation, or otherwise, the residue of the directors of such bank, for the time being, shall elect a director to fill the vacancy." The thirty-second section allowed an election of directors to be held at another time than the day fixed, if it should be then neglected, and then adds: "And then the directors, for the time being, shall continue in office until their successors are

chosen and qualified." It is claimed that Bentley and Jones continued in office from 1822 to 1838, and were then authorized to appoint eleven other directors and commence the performance of corporate acts. It is by no means clear that such power to reorganize the corporation, after so long a suspension of all its corporate functions, would attach to the directors, if they could be regarded as still in office. But it is perfectly clear that neither Bentley nor Jones was in office. Jones had many years before assigned all his stock, and ceasing to be a stockholder, by the positive terms of the law, he ceased to be a director. Bentley had not performed an official act for sixteen years. At the expiration of the year after his election, the bank had no affairs to be managed; it was, to say the least of it, in a state of profound slumber. To say nothing of the absurdity of the officers of a corporation holding on after the corporation itself for every practical purpose was dissolved, we hold, upon the authority of many adjudged cases and the best elementary writers, that so long an abandonment of all official duties must be regarded as an implied resignation of the office. Willcock [43 on Mun. Corp. 238; Ang. & A. on Corp. 425.

It follows, as Jones and Bentley had no power under the law to act as directors, that they could confer none upon their associates; and of course the whole together were incapable of calling forth the sleeping energies of the old corporation.

The next question arises upon the attempted election of directors in January, 1839. This was also claimed to be illegal, and so held by the court. By law, the affairs of the bank were to be managed by thirteen directors, and the concurrence of a majority was necessary to the transaction of any business. These directors, as we have already seen, were required to be stockholders, and to reside in the state. Either qualification ceasing, their office ceased. The policy of this enactment is quite obvious. The legislature supposed that the community would be best protected against fraud and mismanagement of the affairs of the bank by committing its destiny to persons within the reach of our laws, and interested in its capital. They gave the stockholders no power whatever to invest any other persons with the corporate power created by the act of incorporation. Did the stockholders of the bank invest with the power of directors the persons chosen by the election of 1839? That the persons chosen were nominally stockholders, is not denied, but that at least nine of the number were made so by a base fraud,

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and had no real interest, is most manifest. This is clearly proven by the affidavits of the defendants themselves, taken in another proceeding, and read in evidence upon the trial. M. D. Wellman says: "It is the impression of deponent that, in order to obtain a board of directors, stock was transferred to several individuals to make them eligible as directors." S. Bentley says, "he paid no consideration for his shares, and has not been called upon for the payment of the same, either by instalments or otherwise; that the transfer was made to him at the time he was appointed director, and he believes for that purpose." William Childs says, "that stock 44] enough to make him eligible as director was transferred *to him by Benjamin Bentley; and that the understanding was, that deponent was not to pay for his stock at that time, nor has he paid anything on the same." This circumstance, coupled with the fact that every safeguard provided by the law for the security of the public was entirely disregarded, while all these persons not only paid their own debts to the institution after its failure, in its depreciated paper, but also received in exchange for it the obligations due to the bank, can not leave a doubt upon the mind that the whole scheme was a joint conspiracy to defraud the public, and a most palpable fraud upon the law under which they professed to act. Can that same law be set up by them to protect themselves from private responsibility to those they have thus defrauded? Can they take advantage of their own wrong? Can the law tolerate a fraud upon itself?

These questions are most forcibly and pointedly answered in a case between these same parties reported in 15 Ohio, 666. The court there say: "A valid act of incorporation, or an invalid and pretended right to exercise corporate functions, is alike powerless to secure the guilty from the consequences of their fraudulent conduct, where it has been knowingly resorted to as the mere means of chicane and imposition, and used to facilitate the work of deception and injury. Were it otherwise, it would be a reproach to the law." And again, it is said: "If the defendants, with the design to defraud the public generally, have knowingly combined together, and held forth false and deceptive colors, and done acts which are wrong, and have thereby injured the plaintiff, they must make him whole by responding to the full extent of that injury, and they can not place between him and justice, with any success, the charter of the German Bank of Wooster, whether it be valid or void, forfeited

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or *in esse*. Neither a good nor a bad thing may be falsely used for purposes of deception and made a scape-goat for responsibility." And it is added: "Those who combined to use it for the purposes of swindling acted for themselves rather than as agents of the bank."

*In *Vose v. Grant*, 15 Mass. 519, the Supreme Court of Massachusetts say: "If any number of persons combine with intent to injure and defraud another, they can not defend themselves against an action by showing that they did the act in the character of corporations under any charter whatever."

On the whole, we are unanimously of the opinion that the charter of the German Bank of Wooster was never so revived, and the corporation reorganized under it, as to afford any protection whatever to the defendants, or to relieve them from the charge of being unauthorized bankers. In coming to this conclusion, we do not at all draw in question the act incorporating that institution. To have obtained its protection, the defendants must have exercised its powers in good faith, in the manner and by the agents provided for in it. This they have not done. The motion for a new trial will be overruled, and judgment entered on the verdict.

BARTLEY, J., having been of counsel for one of the parties, took no part in the decision of the case.

DOREMUS AND OTHERS v. O'HARRA AND OTHERS

The statute of 1838, relating to assignments of the property of a failing debtor for the purpose of preferring creditors, does not embrace all cases of assignments made by an insolvent debtor, but only refers to those cases where the assignee stands in the character of a trustee, other than his merely receiving a conveyance to secure his own claim.

Where A. had executed to B. certain notes evidencing a debt, and had at the same time executed a bond and power of attorney to confess a judgment for the same debt, and B. having assigned the notes to his creditors, and having entered up judgment in his own name for the amount of the debt on the bond and warrant of attorney, and having afterwards received an assignment of property from A., who was in failing circumstances, for the security of the debt, B., in such case, must be held to be a trustee, and the assign-

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ment thus made to him must inure to the benefit of all the creditors of said debtor, under the provisions of the statute of 1839.

Mitchell v. Gazzam, 12 Ohio, 315, disapproved.

46] *THIS is a bill in chancery reserved in Lucas county by the late Supreme Court for decision in bank.

E. Lane, P. B. Wilcox & Morton, for complainants.

Hitchcock, Wilson & Wade, and *Swayne*, for defendants.

CALDWELL, Ch. J. This is a controversy between the creditors of Charles O'Harra, an insolvent debtor, about the distribution of his property. O'Harra was a dry goods merchant, of the city of Toledo, and had been doing business there for about two years prior to 1846. The business was done exclusively in the name of O'Harra; but the firm of Tompkins & Benedict, of New York city, claim that they were dormant partners, and owned a large interest in the stock of goods. In the latter part of the year 1845, the partnership between O'Harra and Tompkins & Benedict was dissolved. O'Harra continued the business on his own account, and retained the stock in trade of the firm, and thereby became indebted to Tompkins & Benedict for the amount of their interest in the concern. It does not appear that the terms of payment of this indebtedness of O'Harra were fixed, or any evidence of it given at the time of the dissolution of partnership; it is said by Tompkins, in his answer, that these matters were to be adjusted in the spring, when O'Harra was expected to visit New York. About the first of June, 1849, O'Harra visited New York, and with Tompkins executed an article of agreement, which, after reciting that O'Harra had purchased all the interest of the late firm of Tompkins & Benedict in the business of O'Harra, for the sum of \$33,000, and that O'Harra had given a bond and power of attorney to confess a judgment for that amount, in ten days, and had also given his notes for the same sum, payable at different dates, during the years 1846, 1847, and 1848, provided that Tompkins was not bound to wait until the notes should become due, but might, at any time, if he should think the amount thus owing to him in jeopardy, without waiting the maturity of the notes, proceed to collect the same by 47] any legal means. It also authorized him, in such case, to take possession of the goods, debts, dues, demands, and effects of every

kind of O'Harra's, and apply them, or so much of them as might be necessary, to the payment of the debt.

O'Harra also in the agreement further covenanted and pledged his honor that, in case of embarrassment so that he could not continue his business, he would at once assign all his property and effects to Tompkins, preferring him before all other creditors. This agreement, with the notes, bond, and warrant of attorney, all bear date on the first of June, 1846. Tompkins in his answer says that although these papers bear date on the first of June, yet that they were not, in fact, executed until the 8th of June. There is, however, no evidence of that fact.

O'Harra, at this time, from the 3rd to the 5th of June, inclusive, purchased about \$20,000 worth of goods, on credit, from divers merchants of New York, among whom are the complainants in this case. O'Harra referred those from whom he made his purchases to Tompkins. Tompkins represented to several, if not all of them, that O'Harra was a good man, and worthy to be trusted, doing a prosperous business, and that he himself would trust him, etc.

These creditors allege that they trusted O'Harra on the representations of Tompkins. About the first of December, 1846, Tompkins sent these papers, which he held against O'Harra, to H. V. Wilson, an attorney of Cleveland, with instructions to secure the claim in such a way as to him might appear best. Wilson entered up judgment by virtue of the warrant of attorney in Summit county, for upwards of \$34,000, the amount of the claim—took out an execution on his judgment, and went to Toledo, carrying with him the execution. Wilson arrived in Toledo on the 6th of December. He did not have a levy made under the execution, nor did it appear that he informed O'Harra that he had such execution. At this time the notes which O'Harra had given to the New York merchants for the goods purchased in June were falling due and O'Harra was unable to meet them: indeed, there can be no doubt from the evidence in the case, that O'Harra was largely insolvent. On the 11th of December, O'Harra made to Wilson a conveyance, in writing, of all his notes and accounts, amounting in the aggregate to between twelve and fifteen thousand dollars. This conveyance is absolute on its face; but Wilson says, in his deposition, that it was intended as collateral security for the debt. Wilson left Toledo in a few days, leaving the papers and business with E. D. Potter, an attorney of Toledo. Before leaving, however,

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Wilson had made an agreement with Beck, the clerk of O'Harra, that if O'Harra was about to dispose of the goods, he, Beck, should inform Wilson or Potter of it; and that the proceeds of the sale should be placed in the bank to the credit of Wilson. It appears that the execution which Wilson took with him to Toledo, contained, or was supposed to contain, some clerical error, and he returned it to Summit county, to have it reissued. After the correction was made, he returned it to Potter, who received it about the 20th of December, with instructions from Wilson to have it levied. On the 9th of January, 1847, the goods were attached by William Mercer, as the property of Tompkins & Benedict, on a claim which he had against them, and which appears, although the evidence is not positive on that subject, to have been founded in one of the notes given by O'Harra to Tompkins in June, and assigned by him to Mercer, and which formed a part of the amount for which the judgment had been taken in Summit county. Potter paid off the claim of Mercer, out of the notes that had been assigned by O'Harra to Tompkins, and immediately levied the execution, which he held in favor of Tompkins, on the goods in the store of O'Harra, and proceeded to make sale of them. On the 29th of January, the complainants, Doremus & Nixon, and Stebens & Co., on behalf of themselves, and other creditors of O'Harra, filed this bill, claiming a general distribution of the effects of O'Harra among his creditors; a receiver was appointed, who has taken charge of the property of O'Harra, and also the proceeds of the 49] sale by the sheriff. The pleadings, evidence, and arguments of counsel are so voluminous, and the points raised so numerous, that it will be out of our power to refer in detail to the matters in controversy; but we are obliged to refer in a general manner to such questions and facts as we suppose must be decisive of the different points in the case.

In the first place it is contended, on the part of the complainants, that the assignments of the notes and claims of O'Harra, made on the 11th of December, 1846, to Tompkins, come within the provisions of the statute of 1838, relating to assignments to trustees for the purpose of preferring creditors; and that the property embraced in this assignment should inure to the benefit of all the creditors. On the other hand, it is contended, on the part of Tompkins, that the assignment to him was made to secure his own debt, and that he could not in any way be held to be a trustee, holding the property for the benefit of the other creditors. We have been

referred to the decision of *Mitchell v. Gazzam*, 12 Ohio, 315, as giving the true rule applicable to this case. In reference to that decision, we would merely remark, that we think the opinion expressed by the court gives a more extensive operation to the statute than its provisions would warrant.

It would probably be the most equitable mode of distributing the effects of an insolvent debtor to divide the proceeds equally among his creditors, and, when the fact of his insolvency became certain, to prevent one creditor from in any way getting the advantage of another. But this has never been the general policy of our law.

The principle of permitting a creditor to reap the advantage of his vigilance in securing his claim against a failing debtor, is the one that has obtained, with but few exceptions, in our legislation. Hence the party who obtains the first judgment gets a lien on the real estate to the exclusion of other creditors, and he who levies the first execution on personal property appropriates the whole to the payment of his claim, although the debtor, in either instance, may be notoriously insolvent.

The same rule has been adopted in chancery proceedings. *Thus, where a party files his bill to subject equitable assets [50 to the payment of his debt, he thereby obtains a preference over other creditors, although such other creditors may be parties to the same suit. In this view of the case, we do not feel authorized to give any strained construction to the statute, although such construction might tend to promote equality among creditors. Indeed, we do not see any difference in principle, between a creditor securing himself, by taking a lien on the property of a failing debtor, if fairly and honestly done, and thereby obtaining a preference over other creditors, and his obtaining a similar preference by procuring a power of attorney to confess a judgment, or by making the first levy. The language of the statute is plain and explicit: "All assignments of property in trust, which shall be made by debtors to trustees in contemplation of insolvency, with the design to prefer one or more creditors, to the exclusion of others, shall be held to inure to the benefit of all the creditors," etc. *Swan's Stat.* 717. If the intention of the legislature had been, that all assignments of property made by debtors in failing circumstances should inure to the benefit of all the creditors, they would certainly have stated this simple proposition in more plain and perspicuous terms. We suppose that the plain and obvious intent of the law was only

to apply to those cases where the person receiving the assignment could be considered as standing in some relation as a trustee, either in terms or by fair implication, other than that which the mere taking of security for his debt would create. Now what was the character of this assignment to Tompkins? The judgment was in the name of Tompkins, and the debt had been originally his. The notes that O'Harra had given evidencing this debt had been assigned by Tompkins to different persons. The judgment had been taken on the bond and power of attorney without any reference to notes. It would appear, from the direct evidence in the case, that such an assignment had been made on the part of the notes. The claim of Mercer, in virtue of which the attachment was levied, ap-
51] pears to have been founded on one of these notes; *but the state of the pleading has removed all doubt on this subject. The amended bill alleges that most, if not all, of these notes were transferred by Tompkins to his creditors, and charges that the note held by Mercer was one of them. This bill has never been answered by defendants, and we are bound to take its material averments as confessed. In taking this assignment, then, Tompkins received it as a trustee for the benefit of those who were thus entitled to their respective shares of the debt. The assignment, by its terms, as well as its intention, preferred creditors, and there is no question but that it was made with a full knowledge that O'Harra was insolvent. This assignment then comes clearly within the statute, and the property thus assigned must be decreed to inure to the benefit of all the creditors in proportion to their respective demands. The next question arises in reference to the stock of goods. It is urged, on the part of complainants, that Wilson took possession of the store of goods at the time that he visited Toledo, in accordance with the contract of the first of June, 1846, and that the goods were actually in the possession of Tompkins, by his agents, from that time up to the time of the levy; that Tompkins therefore held the goods in trust for the benefit of all the creditors. The contract of June did not give a lien on the property; it only provided that Tompkins might, if he considered his claim in jeopardy, take possession of all the goods and dispose of them for his own benefit. It further provided, that if O'Harra should fail to meet his engagements, that he would make an assignment to Tompkins of all his effects, preferring him to all other creditors. Now, if Tompkins, previous to the levy, had taken possession of

these goods by virtue of his agreement, or by any other assignment, he would, under the circumstances, have become a trustee for the benefit of all the creditors, and could not have destroyed or affected the trust by his levy. Did Wilson or Potter, or any other person, on behalf of Tompkins, receive an assignment of, or take possession of these goods? The evidence relied on by complainants consists principally of the *statements of O'Harra, [52 and the statements and conduct of Potter and Wilson in reference to the goods. D. O. Morton states that at the time Wilson was in Toledo, Wilson stated to him that O'Harra had turned out everything to him, and that he supposed he meant the goods as well as the other assets. O'Harra stated to a number of persons that he had delivered up his store and everything to Tompkins. Potter, after Wilson left, called on two or three persons and tried to make a sale of the goods, stating that he would have the fixing of the terms of payment, as the money was coming to him. Wilson agreed with Beck, the clerk of O'Harra, that in case O'Harra should attempt to dispose of the goods, that he, Beck, should immediately inform Potter of that fact. He also agreed with him, that the proceeds for sale in the store should be deposited in the bank, to the credit of Wilson, and at the same time made an arrangement with the cashier to send him the money. It appears, too, that about the month of December, 1846, Tompkins wrote a letter to Culbertson, of Pickaway, offering to sell him this stock of goods. This, and some other evidence of a similar character, is relied on as showing the goods to have been in the possession and under the control of Tompkin's agent. The evidence, unexplained, would go very far to prove this state of case. On the other hand, we have the positive statements of both Wilson and Potter, that they never took any assignment of the goods, nor took possession of them in any way. Wilson says he had no conversation with O'Harra in reference to an assignment of the goods; that he had with him the agreement of the first of June, but he did not show it to O'Harra, nor did he intend to use it, unless it became absolutely necessary.

Potter states that he and Wilson had consultation on the subject of an assignment, and agreed that it would not do, and that they would rely on their execution. It would appear probable, from the evidence, that O'Harra thought that Tompkins had control of the goods, by virtue of the contract of June; and that the agents of Tompkins did not take *any pains to disabuse his mind on [53

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that subject. As Potter expressed it to some one, he was willing to indulge him in that conceit. Potter states that he and O'Harra had agreed, that if the goods could be sold at private sale, that the proceeds should be applied to the payment of Tompkins' debt; and that, to avoid the sacrifice that would be likely to attend a sale on execution, he interested himself in having them thus disposed of. Now, there is no doubt but that Wilson and Potter, being in advance of the other creditors, and holding in their hands an execution which they could at once lay on the goods, felt towards them as if they belonged to Tompkins, and this, we believe, goes to explain most of their statements and acts, which, unexplained, might bear another construction.

Now, the fact that Wilson made an arrangement with the clerk of O'Harra, to receive for his use all the proceeds of the sale, does not necessarily imply that he considered the goods as under his control, because he might receive the proceeds of sale to apply on Tompkins' claim, and the goods still remain in O'Harra. Still, it is a strong item of evidence, unexplained, to prove the goods in the control of Tompkins. If we are right, however, in our opinion that O'Harra thought that Tompkins had an absolute right to the control of the goods by virtue of the agreement of June, it will go far to explain why he, O'Harra, was willing to acquiesce in such an arrangement. A careful examination of the evidence has brought us to the conclusion that Wilson and Potter never received an assignment of the goods, nor ever took them into possession, and Tompkins consequently had a right to hold the goods, freed from the claims of the other creditors by virtue of his levy.

It is urged on the part of complainants that Tompkins was guilty of a fraud, in representing to them, at the time they sold him the goods, that he, O'Harra, was a safe man to be trusted. Now, we can hardly think it probable that Tompkins could have thought O'Harra's circumstances such as he represented them to 54] be. We do not see, however, that any claim that complainants may have against Tompkins on this account can be adjusted in this case. This is a proceeding by the creditors of O'Harra, to subject his effects to the payment of their claims. Any claim that one creditor may have against another is collateral to the object of the case. Besides, the nature of the claim does not fall within the general jurisdiction of a court of chancery. This disposes of

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the whole case; and we do not consider it necessary to proceed further to notice the other points that have been discussed.

Decree for Complainants.

LINUS TRACEY v. SKENE D. SACKET.

Mere difference of opinion as to the weight of evidence given in the court below will not justify the reversal of a decree upon a bill of review.

The acts and contracts of persons of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion either that the party, through undue influence, has not exercised a deliberate judgment, or has been imposed upon, circumvented, or overcome by cunning or artifice. Where there is imbecility, or weakness of mind, arising from old age, sickness, intemperance, or other cause, and inadequacy of consideration; or where there is weakness of mind, and circumstances of undue influence and advantage; in either case, a contract may be set aside in equity. *Buckley v. Gilmore*, 12 Ohio, 75, approved.

THIS is a bill of review reserved in the county of Ashtabula. The original bill was filed by Sacket against Tracey in the Court of Common Pleas of Ashtabula county, in October, 1843, in which court, at the March term thereof, 1845, a decree was rendered against Tracey, from which he appealed to the Supreme Court. At the September term of the Supreme Court, 1846, a decree was rendered against Tracey, and the cause referred to a master commissioner to state an account between the parties. At the September term, *1847, the master having reported, the decree was [55 made final between the parties. And it is to review and reverse this decree that the present bill is filed.

The case, as presented by the original bill, answer and testimony, is substantially as follows: Skene D. Sacket being the owner of an eighty acre tract of land in said county, on which he had resided for many years, and also of personal property to the amount of between three and four hundred dollars, in the month of August, 1841, conveyed by deed his farm to Tracey, and also at the same time delivered and made over to him all his personal property, together with a pension of ninety-six dollars a year for his services as a rev-

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olutionary soldier'; in consideration whereof, Tracey gave to Sacket a written obligation to support him and his wife, which is in the following words :

"Know all men by these presents, that I, Linus Tracey, of Mesopotamia, Trumbull county, and State of Ohio, have received of Skene D. Sacket the sum of twelve hundred dollars; and in consideration for which, I, for myself, my heirs, executors and administrators, covenant, grant, promise and agree to and with said S. D. Sacket, that I will faithfully perform all the stipulations following, to wit : I will provide the said S. D. Sacket, and Lorilla his wife, with food and raiment, and every thing necessary to their very comfortable existence and support during each of their natural lives; and should any difficulty grow out of this arrangement, any and all such questions and difficulties *are to be decided on principles of equity*. In witness whereof, I have hereunto set my hand and seal this 28th day of August, A. D. 1841. LINUS TRACEY."

In November, 1841, Tracey removed Sacket and his wife to a house near his own residence, where they continued to reside until May, 1843, when they abandoned the house and refused longer to be dependent on Tracey for their support, upon the alleged ground that he had not faithfully complied with the contract on his part by providing for them a suitable support.

56] *Sacket was, at the time of the arrangement, about eighty years of age, occasionally addicted to intemperance, and had had a severe attack of sickness in 1839. And several witnesses testify that his weakness of mind rendered him incompetent to the management of his own affairs, and easily controlled by others. He had several sons by a former wife living near him, but his present wife was unwilling to live with any of them. Prior to the contract with Tracey, Sacket had made a similar transfer of his property to Charles Davis, a reputed brother of his wife. This arrangement, however, did not last long: the parties having differed, the contract was rescinded by mutual consent. Sacket owed debts to an amount something over three hundred dollars, about the one-half of which was coming to Tracey, who had been receiving Sacket's pension of ninety-six dollars a year to apply in payment. And when Davis' arrangement with Sacket was abandoned, Tracey informed Sacket that, as he had no person then to manage for him, some arrangement must be made for the security of his, Tracey's, debt; and proposed that, if no other person would do it, he would

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take his property and engage to support him and his wife. Tracey is not related to Sacket, and claims that he was very reluctant to engage in the arrangement; but his manifestation of reluctance was only such as was calculated to impress Sacket's mind favorably toward his proposition.

During the eighteen months which Sacket lived under the arrangement with Tracey, he occupied a small log house and lived in a frugal manner. He took charge of a small dairy for Tracey, and a part of the time boarded Tracey's hired hands. His wife did the work about the house, and he chopped wood and assisted his wife in the dairy. Tracey was unwilling that Sacket and his wife should visit their friends, and refused to furnish them with a conveyance for that purpose. The provisions furnished by Tracey for their support, were supplied in small quantities at a time; and, if the testimony is to be relied on, the supply was at times wholly insufficient. Tracey neglected to pay the debts of *Sacket in [57 the manner required by his contract. And one witness testifies that in a conversation with Tracey in 1841, Tracey stated that he had told witness' brother that his mind was so absorbed about making property, that he had, in some measure, neglected his religious duties; and went on to state to the witness, that he had made property fast, and should make a thousand dollars out of Sacket the worst way he could fix it. And upon inquiry by the witness how he could do it he said, that the old man is pretty old and would live but a few years; and that if Mrs. Sacket, who was younger, should outlive the old man, the probability was that she would not live under his care a great while, and that he should be enabled to settle off with her for a small sum.

The decree, without any special finding of the facts, set aside the conveyance from Sacket to Tracey, required Tracey to account for the amount of the personal property received by him from Sacket, and also the rents and profits of Sacket's farm while in his possession; gave him credit for the maintenance he had furnished, and made an adjustment of the accounts between the parties generally.

The errors assigned as the ground for the reversal of this decree are substantially the following:

First. The decree set aside the conveyance from Sacket to Tracey, without any proof of fraud on the part of Tracey in procuring the same, or imbecility of mind on the part of Sacket.

Second. The court confirmed the master's report, except as to

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one exception ; when the report was not only unsupported by the testimony, but directly in opposition to the plainest and most positive proof.

Third. The court found the equity of the case with Sackett, when, from the proof, it was clearly with Tracey, and required the dismissal of the bill.

Crowell and R. Hitchcock for complainant.

Simonds & Cadwell for defendant.

58] BARTLEY, J. The errors assigned are founded in matters *of fact, and this court would not be disposed to disturb a decree resting upon facts which have been once found, except in a very clear case. Mere difference of opinion as to the weight of the evidence would not justify the reversal of a decree upon a bill of review. *Buckley v. Gilmore*, 12 Ohio, 75.

But we see no difficulty in sustaining this decree upon the facts of the case. The contract between Tracey and Sacket was of such a nature as would be properly regarded by any court of equity with scrutinizing jealousy. It is said by Justice Story that courts of chancery acting upon an enlarged equity flowing from the principles of natural justice, will afford protection to the necessitous and those approaching to an incapacity to bind themselves by a contract, against the designs of calculating rapacity, which the law constantly discountenances. To maintain this contract, on the part of Tracey, in a court of equity, even if divested of all circumstances of fraud or imposition, would require of him the utmost good faith in the making of the contract, and a strict performance, characterized by a benevolent regard for the welfare of those who were committed to his charge.

The proof of actual fraud upon the part of Tracey, or of insanity on the part of Sacket, was not essentially necessary, in order to set aside the contract. It appears to be well settled, as a general rule, "that the acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence." *Gartside v. Isherwood*, 1 Brown's Chan. 560 ; 1 Story's Eq. Jur. sec. 238. It is laid down in the case of *Cruise v. Christopher's Administrator*, 5 Dana,

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181, that mental imbecility, not amounting to absolute disqualification, induces a vigilant and strict examination, in chancery, of the contracts made by one laboring under it; and when coupled with inadequacy *of consideration they constitute such evidence of [59 fraud as may be sufficient to set aside a contract.

It is settled in *Whiteburn v. Hines*, 1 Munf. 557, that where one of weak intellect, though not an idiot, was induced to make a deed through the undue influence of one in whom he placed confidence, the deed was set aside. And it is laid down in the case of *Buffalow v. Buffalow*, 2 Dev. & Bat. Chan. 241, that a conveyance obtained from a man of weak mind, by taking advantage of confidence reposed by him in the grantee, will be set aside, although the grantor is not *non compos*.

The case of *Dunn v. Chambers*, 4 Barb. S. C. 376, was a bill in equity for relief against an improvident sale, and the evidence being found insufficient to justify a decree declaring the deed void, as having been fraudulently obtained, yet having been obtained under such circumstances as to render it at least unfair and unreasonable for the defendant to retain the full advantage of his bargain, the court may direct that the deed shall stand only as security for the defendant's indemnity in respect of the sum actually advanced.

It is said that a court of equity will not measure the size of men's understandings or capacities, there being no such thing as an equitable incapacity where there is a legal capacity; and that the law will not relieve a man who is capable of taking care of his own interest, except where he is imposed on by deceit, against which ordinary prudence could not protect him. But whatever weight this may be entitled to, and whatever may be its application, it is obvious that weakness of mind may constitute a very important circumstance to prove that a contract has been obtained through fraud, imposition, or undue influence. The strongest minds can not always protect themselves against deceit and artifice. The law requires that good faith should be observed in all transactions between man and man. And those who, from imbecility of mind, are incapable of guarding themselves against fraud and imposition, are under the special protection of the law.

*The rule to be collected from all the authorities, I take to [60 be this: Where there is imbecility or weakness of mind arising from old age, sickness, intemperance, or other cause, and plain in-

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adequacy of consideration, or where there is weakness of mind, and circumstances of undue influence and advantage, in either case, a contract may be set aside in equity.

Applying this rule, there is no difficulty in sustaining this decree on the evidence in this case. There was great weakness of mind on the part of Sacket, arising from extreme old age, increased, perhaps, by intemperance and sickness. There was clearly an inadequacy of consideration, and an overreaching and undue influence, and an unconscionable advantage on the part of Tracey, which, in a court of equity, fully justified the setting aside of the contract. Besides this, there was not that strict and full compliance with the terms of the contract on the part of Tracey, which good faith and the policy of the law required at his hands in a contract of this nature.

The terms of the contract required him not only to provide Sacket and his wife with food and raiment, "but everything necessary for their very comfortable existence and support." And the nature of this contract required of him, in the performance on his part, a kind of benevolent regard for their dependent situation. He had no right to reduce them to a state of servitude. True, he claims they consented to, and even solicited the services imposed on them. This excuse is easily made by a person having the control he had, from his position, over aged and weak-minded persons.

The fiduciary situation assumed by him in the contract enjoined upon him an entirely different course of treatment; and instead of having his mind fixed upon the matter of speculating and making property out of the arrangement, to the neglect of his religious duties, his attention should have been directed to the making of a suitable provision for the dependent persons taken by him under his control.

61] It is the opinion of the court that the decree carried out *the stipulation of the contract, which required "all questions or difficulties to be decided on principles of equity."

The bill is, therefore, dismissed.

RANNEY, J., having been of counsel, did not sit in this case.

WILLIAM BUCK v. THE STATE OF OHIO.

The act of January 17, 1846, the "more effectually to prevent gambling," does not repeal, alter or modify the act of March 12, 1831, "for the prevention of gaming," but comes in aid of the latter to suppress gambling houses, and to punish severely the keeper of any gaming device or establishment.

The voluntary permission of a single act of gaming in a house or place not kept "to be used or occupied for gambling," does not come within the act of January 17, 1846, but is provided for by the 9th section of the act of March 12, 1831.

An indictment under said section of said last named act, is defective, unless it set forth the names of the person or persons permitted by the accused to play, or an averment that their names are unknown.

Although, on an indictment containing several counts, some of which are defective, and one of which is good, a general verdict of guilty will be held to apply to the good count, and support the indictment, yet such general verdict will not authorize separate penalties upon separate counts.

THIS is a writ of error to the Court of Common Pleas of Pickaway county, reserved to the late court in bank.

Atwater & Cradlebaugh, for plaintiff in error.

Pugh, Attorney General for the state.

CORWIN, J. At the April term of the Court of Common Pleas, 1850, the plaintiff in error was arraigned upon an indictment preferred against him, under the act of January 17, 1846, the "more effectually to prevent gambling," 44 Ohio L. 10, 1 Curwen, 626, to which he pleaded not guilty; and the cause was submitted to a jury, who returned a general verdict of guilty, and thereupon the court assessed a fine against him of \$150, upon each one of the two counts of the indictment; upon the record of which proceeding, the plaintiff has made the following assignment of errors:

"First. The offense is laid with a *continuando*.

*"Second. Separate judgments are given upon each count, [62 when the offense is the same and the verdict is general."

The first count in the indictment charges, in substance, that Buck, on the first day of December, 1849, and on divers other days, etc., with force and arms, at, etc., did keep a room, there situate, to be used for gambling, and did then and there, and on divers other days and times, etc., unlawfully and injuriously cause and procure divers idle and ill-disposed persons to game together.

The second count charges that Buck, on the first day of December, 1849, and on divers other days and times, etc., with force and arms, at, etc., did keep a room, there situate, and in said room did, on said day and divers other days, etc., knowingly permit the said room to be used for gambling.

We find no fault with the pleading, on account of the first error assigned; but hold it to be settled that offenses of this description may be well laid in an indictment with a *continuando*. But even if this were doubtful, as each count in the indictment distinctly charges the offense to have been committed on the first day of December, 1849, it is described with sufficient certainty as to time; and the general averment that similar offenses were committed by the defendant on divers other days and times, may be rejected as surplusage. *People v. Adams*, 17 Wend. 475.

As to the second error assigned, although it has been held by the late court in bank, that where there are several counts in an indictment, some of which are defective, and one of which is good, a general verdict of guilty will be held to apply to the good count, and support the indictment; yet it may well be doubted whether, in any case, a general verdict of guilty will authorize separate penalties to be inflicted upon the separate counts in the indictment.

While it may be said that a general verdict of guilty means that the defendant is guilty as he stands charged in the indictment, yet it is evident that under the common practice adopted by prudent and careful pleaders, of charging the same offense, in different 63] forms, in different counts of the indictment, in order that the proofs may correspond with the charge as laid in some one of the counts, the punishment of a defendant upon each of the counts thus pleaded, when, in fact but one offense had been proven, would be fraught with the most monstrous injustice and oppression. And in view of the looseness of practice which sometimes prevails in this particular, a majority of the court think it more safe and just to require, that to authorize separate penalties to be inflicted upon the different counts of an indictment, there shall be a separate finding upon each of the counts. But it is not necessary to decide this question now, as the offense described in the second count of the indictment does not come within the provisions of the act referred to, and therefore can not be sustained.

The act "more effectually to prevent gambling" does not repeal, alter, or modify the act of March 12, 1831, entitled "an act for

the prevention of gaming," Swan's Stat. 426, but simply comes in aid of the latter act, by provisions intended to break up gambling houses and punish severely the keeper of any gaming establishment or device. The first section of the act of January 17, 1846, provides for the punishment of two descriptions of persons only, viz: The keeper of a room to be used for gambling, and the owner of a room who shall rent the same, to be used or occupied for gambling, and the owner of the room so kept to be used or occupied for gambling, who shall knowingly permit the same to be so used or occupied, and shall not make complaint thereof. The second count of the indictment in the case under consideration, does not bring the defendant within either of those descriptions. He is not charged as the keeper of a room, which is kept to be used for gambling, nor as the owner of a room, who had rented the same to be used or occupied for gambling, nor as an owner of a room kept to be used or occupied for gambling, who knowingly permitted it to be so used or occupied, and had failed to make complaint, but simply that he kept a room which he knowingly permitted to be used for gambling.

*A single act, such as charged in this second count, might [64 occur in any man's house or place of business, and would not come within the plain meaning and object of the act of January 17, 1846, unless it occurred in a room or place, kept for the purposes of gambling. Such an act might subject the defendant to the penalties prescribed in the 9th or 10th sections of the act of March 12, 1831, if the count were in other respects sufficient; but under that act, it was held by the late court in bank in *Davis v. The State of Ohio*, 7 Ohio, part 1, 204, that the indictment should set forth the names of the parties who were permitted by the accused to play, or if the names are unknown, it should be so alleged. No such averment being contained in the second count of this indictment, it is defective under the statute of March 12, 1831; and, for the reasons before assigned, it is equally defective under the act of January 17, 1846. The offense charged in the first count is complete whether any gambling was, in fact, done there or not—the preparation, fitting up, holding out, and keeping such a room for such a purpose, fully constituting the offense, and therefore, it is wholly unnecessary to make any averments as to the fact of gambling having been done, or as to the persons who did it. There being no objection to the proceeding so far as the first count is concerned, the

judgment of the court below thereon is affirmed with costs. The judgment of the court upon the second count is reversed.

BARTLEY, J. Dissented from the opinion of the majority of the court, as to the reversal of the judgment of the Common Pleas, on the ground of the insufficiency of the second count in the indictment, for the following reasons :

1. It is not assigned for error. A judgment ought not to be reversed, on ground not relied on by the plaintiff either upon special or general assignment of error.

2. The second count sets forth the offense in the precise language of the statute, and that is sufficient. *U. S. v. Lancaster*, 2 McLean, 65] 431. This count is framed under the second *clause of the first section of the statute of 1846, for the prevention of gambling ; and alleges that the defendant being the keeper of a certain room then and there situate, knowingly permitted the same to be used and occupied for gambling, etc.

The statutory description of the offenses made punishable under the first section of the act is as follows : "If any person shall keep a room or other tenement, to be used or occupied for gambling, or shall knowingly permit the same to be used or occupied for gambling; or if any person being the owner of any room or other tenement, shall rent the same to be used or occupied for gambling, the person so offending, shall, on conviction thereof, be fined, etc." Three offenses are here described : 1. The keeping of a room for the purpose of gambling. 2. Knowingly permitting a room, etc., in the keeping of the person, to be used or occupied for gambling, whether kept for that purpose or not. 3. Being the owner of a room, etc., and renting the same for the purpose of gambling. The first two apply to the keeper of the room, whether he be the owner or not. The gist of the offense in the first consists in the purpose for which the room is kept; that of the second in the act knowingly permitted in the room in his keeping, whether kept for that purpose or not. The second may include the first, or it may not.

The object of the second clause was to prevent an evasion of the laws by a person keeping a room, etc., to be used for some proper and legitimate purpose, and yet knowingly permitting gambling in the same. The words "the same," in the second clause, refer to the room, etc., specified, and not to the purpose or use designated in the preceding clause. That the operation of the second clause

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is not limited to the owner, is apparent: 1. Because the language is general, applying to any person who shall keep the room. 2. The next succeeding clause is, by express terms, limited to the owner, showing that a distinction between the owner and the keeper was contemplated. 3. The closing part of the section, by a rule of evidence, extends the operation of the *second clause, so [66] as to reach the owner under a particular state of facts. If this construction be correct, the second count is sufficient.

The rule laid down in the case of *Davis v. The State*, 7 Ohio, 206, has no application to this case. That was the case of an indictment under the act of 1831, the language of which, having reference to certain games played, is subject to a different rule in the description of the offense. It would produce great difficulty in indicting offenders under the law of 1846, to require the indictment to specify the names of the persons who gambled, the game played, and the amount played for, etc. And there could be no good reason for requiring such particularity.

There was error in the judgment of the Common Pleas. The offenses charged are of the same nature, may be parts of the same transaction, and the offense in the second count may include that charged in the first count. In such a ~~case~~, at least, on a general verdict of guilty, the court could not impose more than one punishment. *The U. S. v. Dickinson*, 2 McLean, 228; *Wharton's Amer. Crim. Law*, 109.

DAVID STEWART v. THE STATE OF OHIO.

It is not error to excuse a struck juror from serving for good cause shown; and that he is a postmaster is good cause.

In a trial for murder in the second degree, the state may prove previous threats made by the defendant against the person he afterwards killed, in order to show that the killing was malicious.

In a criminal, as well as in a civil case, the judgment will not be reversed for a misdirection of the court to the jury on an abstract question of law that could not arise upon the testimony, or influence the decision of the jury.

D. with his fist assaulted S. in the street. S. instantly stabbed him in five places, of which wounds he died. There was no evidence tending to prove that S., when he gave the fatal wounds, was in danger of loss of life, or

limb, or great bodily harm, or that he had a reasonable apprehension of such danger. *Held*: That the killing was not excusable homicide, *se defendendo*.

67] *When the slayer seeks and provokes an assault upon himself, in order to have a pretext for stabbing his adversary, and does, upon being assaulted, stab and kill him, such killing is not excusable homicide in self-defense.

A person assaulted may repel force by force, but it does not follow that he may, without necessity, use a deadly weapon for that purpose. And he is yet more unjustifiable if his weapon is concealed.

It is not error to charge a jury "to take into consideration the manner by which, and the purposes for which the prisoner had the possession of the knife with which he committed the homicide."

When a court has charged a jury upon a point, and afterward an instruction is prayed, which, in substance, is the same as the charge given, it is not error to decline giving it on the ground that the court has already charged on that point.

THIS is a writ of error to the Common Pleas of Clark county, reserved by the late Supreme Court for decision in bank.

At October term, 1850, of the Common Pleas, the plaintiff in error was indicted for the murder of James R. Dotey. The indictment charged murder in the second degree. At a special term held in November following, he was tried, found guilty as charged, and sentenced. The sentence was reversed by the court in bank at its December term, 1850 (19 Ohio, 302). At August term, 1851, of the Common Pleas, he was again tried, by a struck jury, and again convicted of murder in the second degree. Upon this trial sundry bills of exception were taken, which contain certain rulings of the court, the charge to the jury, and the whole of the evidence. A motion was made for a new trial, which was overruled, and sentence pronounced—to reverse which this writ is prosecuted. The errors assigned, the opinions of the court excepted to, and the testimony, so far as it is necessary to state it, appear in the opinion of the court.

Anthony & Goode, for plaintiff in error: *Walker's Am. Law*, 444; *Selfridge's Case*; *Wharton's Crim. Law*, 259; *Granger v. The State*, 5 Yerg. 459; *State v. Noble*, 1 West. L. J. 23; *State v. Walker*.

Wm. White, prosecuting attorney, and *Wm. A. Rodgers*, for the
68] state, *U. S. v. Travers*: 2 *Wheeler's Crim. Cases*, 498, *507; *State v. Lane*, 4 Ired. 113; 1 *Hale*, 481-3; *Hayden v. The State*, 4 *Blackf.* 547; 4 *U. S. Statutes at Large*, 112-35.

THURMAN, J. The first error assigned is that the court erred in excusing Caleb Barrett from serving on the struck jury, on the ground that he was an acting postmaster. The bill of exceptions states that the struck jury having been called, fourteen of them appeared, whereupon Caleb Barrett, one of said jury, and the fourth in number, as called, asked to be excused on the ground that he, being a postmaster at Vienna, Clark county, was not bound to serve as a juror. The defendant, Stewart, by his counsel, admitted the fact of his being postmaster, but objected to his right to exemption; which objection was overruled by the court, and he was excused—to which ruling the defendant excepted.

No reason is stated by counsel why this was erroneous. We suppose the ground of objection was that the statute makes no express provision for excusing a struck juror. The twenty-second section of the act relating to juries (Swan's St. 495), after prescribing the mode of striking and summoning a struck jury, proceeds as follows: "And upon the trial of said cause, the jury so struck shall be called as they stand upon the panel; and the first twelve of them who shall appear, and are not challenged, or shall be found duly qualified and indifferent, shall be the jury, and sworn to try said cause."

We think this provision is not so stringent as to preclude a juror's being excused from serving when good ground of excuse is laid. Such a construction might render the mode of trial by struck jury almost impracticable. A statutory provision conferring in express terms the power to excuse is not indispensable. Without it, the court would have the power under the general jurisdiction conferred upon it. The eighth section of the jury act is the only one in which any mention is made of excusing a juror from serving, and it rather recognizes, than confers upon the court, the power to excuse.

*Was the ground of excuse sufficient? Barrett was a post- [69 master, and by the act of Congress relating to the post-office department, was expressly exempted from serving on juries. Independent of this, the nature of his duties and the public interest required that he should be excused. We find no error in the ruling of the court on this point.

The second, third, and fourth assignments of error, are that the court erred in admitting the testimony of George Huff, in reference to the witness having seen the knife, with which the homicide was

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committed, before the affray in which Dotey was killed ; and as to conversations had with, and statements made by Stewart the day before the affray ; and in admitting the testimony of Pierson Spinning, as to conversations had with Stewart the day the affray occurred, but some hours before its occurrence ; and in admitting the testimony of Alfred Beall as to conversations had with Stewart the day of the affray and the day before.

These alleged errors may be considered together. The homicide was committed Monday, September 9, 1850. On the Saturday night previous, a difficulty took place between Stewart, Dotey, McCartney and Jennings, in relation to a small debt, twenty-five cents, due by Dotey, or McCartney, to Stewart. In the forenoon of the next day, as George Huff testified, Stewart showed witness the knife, with which Dotey was afterwards killed. He opened it and greased it, and said if he had had it the night before when he was attacked, he did not think Dotey would have got out of the bar-room safe ; that if he ever attacked him again—he or any of the crowd that was with him—he would cut his d—d guts out.

Spinning testified, that Stewart called on him as a justice of the peace, on Monday, September 9, 1850, wanted a capias against McCartney, and told witness the difficulty existing between them. He said that on Saturday evening, Dotey, McCartney, and another met him at the tavern and had a dispute about the debt ; that they came upon him apparently with the intention to whip him ; that 70] they did not succeed in *molesting him ; that if he had had a knife he would have put it into McCartney, or into them, witness did not recollect which ; that he would have put the knife into the one that was pushing on to him the strongest. Witness observed to him, that certainly for so small an offense he would not lay himself liable to go to the penitentiary. He replied he would be justified in doing it. Witness asked if they had any bowie knives, pistols, or other arms, that would justify him in doing it. He said, no, he did not know that they had. Witness asked if they had him so cornered up, or any dangerous weapons over him, that he could not retreat. He said he did not know that they had any weapons, but that there were two or three of them, and on that ground he would be justified. I, the witness, replied, that I was sorry he would endanger himself for so small an affair ; that I did not consider he would be justified.

Beall testified as follows : On Sunday morning, I had a conver-

sation with Stewart. He stated that Dotey owed him some money, and when he asked him for it, he attempted to whip him. He wanted to know what I would do in such a case. I told him I would not be bullied out of my right. He then drew a knife out of his pocket, a large knife, which opened with a spring, and said that if he had had it the night before, he would have cut his d—d guts out; that he intended to carry it and ask him for the money whenever he saw him again, and if he attempted to whip him, he would cut his d—d guts out; that he would dun him every time that he met him.

This is the testimony of the three witnesses named, which was objected to, and the admission of which is alleged as error. Why it was erroneous to admit it counsel do not state; but we infer, from what appears in the record, that it was objected to upon the ground that it tended to prove the accused guilty of murder in the first degree, and was therefore inadmissible under an indictment charging him with murder in the second degree. But surely it tended to prove the malice charged in the indictment, and was, therefore, *relevant testimony and properly admitted. Be- [71 sides, if the charge asked for by the prisoner's counsel, and actually given by the court—namely, that if the jury found that the crime committed was murder in the first degree, there must be an acquittal, as the charge in the indictment was of murder in the second degree—were sound law, then the admission of testimony tending to prove the accused guilty of a greater crime, was not to his prejudice, and can furnish no ground to reverse his sentence.

The fifth error assigned is, that the court erred and misdirected the jury in the charge delivered to them as to the law of homicide in self-defense, and in refusing certain charges asked by the accused.

The charge complained of was in these words: "The homicide in self-defense, which is considered as excusable, rather than justifiable, is that whereby a man may protect himself from an assault in the course of a sudden, casual affray, by killing him who assaults him. In such a case, however, the law requires of the party to have quitted the combat before a mortal wound shall have been given, if in his power to retreat, as far as he can with safety, and at last to kill from mere urgent necessity, for the preservation of his life, or to avoid enormous bodily harm. He is supposed to kill his adversary under the impression of an absolute necessity to do

so, in order to save his own life, or to save himself from enormous bodily harm. If the person killing was not in any supposed or real imminent danger of his own life, or of enormous bodily harm, and if the jury find that the prisoner could not reasonably apprehend from the deceased, and did not so apprehend any danger of his own life or of enormous bodily harm, then the killing is not excusable homicide."

It is not denied that this charge has a great weight of authority in its support. Indeed, it was more lenient to the accused than the doctrine of many adjudicated cases, in this, that it makes the homicide excusable if the slayer had reasonable cause to apprehend, and 72] did apprehend danger *to his life or great bodily harm, although such danger may not, in fact, have existed. And the court, at the prisoner's request, also charged that "the law does not measure nicely the degree of force which may be employed by a person attacked, and that if he employ more force than necessary he is not responsible for it, unless it is so disproportioned to his apparent danger as to show wantonness, revenge, or a malicious purpose to injure the assailant."

But the part of the charge which seems to be objected to, is that which relates to the necessity of quitting the combat, if it could be done with safety, before taking the life of the assailant; and it is urged that the law in Ohio is, that a person assailed may, in all cases, without retreating, take his assailant's life, if he reasonably believe it necessary to do so, in order to save his own life or to avoid great bodily harm; and this, although he could, without increasing his danger, retire, and thereby escape all necessity of slaying his adversary.

As to what is the precise state of the law on this subject, there is some diversity of opinion among the members of this court, and, therefore, without attempting at this time to lay it down, we prefer to dispose of the case upon a view which is satisfactory to us all. And we do this the more willingly because there is not a full bench sitting upon the case. Whether a person assaulted is, or is not, bound to quit the combat, if he can safely do so, before taking life, it will not be denied that, in order to justify the homicide, he must, at least, have reasonably apprehended the loss of his own life or great bodily harm, to prevent which, and under a real, or at least supposed necessity, the fatal blow must be given. And again, the combat must not have been of his own seeking, and he must not

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have put himself in the way of being assaulted, in order that, when assaulted and hard pressed, he might take the life of his assailant. It will also be admitted that in a criminal, as well as a civil cause, before the judgment can be reversed for error in the charge to the jury, it must appear that some evidence was given tending to prove *a state of case in which the charge would be material. If [73 the charge was upon a mere abstract question of law that could not arise upon the testimony, and could not influence the decision of the jury, its character, however erroneous, furnishes no ground to reverse the sentence. And such, we are clearly of opinion, was the case under consideration. We find no evidence tending to prove that Stewart, when he slew Dotey, was in danger of loss of life, or limb, or of great bodily harm, or that he apprehended such danger. Were there any evidence, however slight, tending to show that he reasonably believed such danger to exist, we would feel bound to decide upon the correctness of the charge complained of; but we see no such testimony. And we are equally satisfied that the combat did not occur without blame on his part. On Sunday, the day previous to the murder, he showed George Huff the knife with which he afterwards killed Dotey. It was a very deadly weapon, the blade of which opened with a spring. He opened it and prepared it for use by greasing it, and said that if he had had it the night before when he was attacked, he did not think that Dotey would have got out of the bar-room safe; and that if Dotey ever attacked him again—he or any of the crowd that was with him—he would cut his d——d guts out. On the same day he made similar declarations to the witness Beall, and showed him the knife, and told him he intended to carry it, and ask Dotey for the money whenever he saw him again, and if he attempted to whip him he would cut his d——d guts out; that he would dun him every time he met him. He made similar statements to Pierson Spinning, Monday morning. The affray took place just after supper, Monday evening. John Huff testifies that, before supper that evening, "I was sitting on the bench by the bar-room door, and Stewart said to me, John, there will be war here to-night. I thought he referred to the military that were encamping in town, and replied that I reckoned not. Stewart replied, Yes, he guessed there would be war; that McCartney and Dotey were coming down there to whip him if he asked them for *the money they owed him, and he said [74 he intended to ask them for it." Shortly after supper Stewart

came out of the hotel, his boarding-house, and saw Dotey and McCartney standing on the pavement. Dotey was leaning against a post. Stewart came forward to near where he was standing and said, John and Jim, I want to know if you are going to pay me the money you owe me. Dotey told him to go away about his business, he did not want anything to do with him, or to say to him. Stewart replied that he had paid for Dotey's dinner, and he ought to be man enough to pay for that. Dotey said he had meant to pay, but Stewart had acted so meanly in dunning him in the street at every opportunity, that he did not intend to pay. Stewart said he had asked him for it in private. Dotey denied it. Stewart reaffirmed his statement, and Dotey replied, It's a lie. Stewart rejoined: "It's a damned lie," or "You are a damned liar." Dotey said: "I won't take that," and advanced towards Stewart with his hand raised to strike him, and struck at him. Stewart did not move, and as soon as Dotey came within reach, he stabbed him, and, repeating his blows, gave him five stabs—one in the abdomen which severed the intestines, one in the back, two through the left arm, and one between the shoulder-bade and ribs. Dotey cried out, "Take him away, he has a knife." They were then separated by some of the bystanders, and Dotey afterwards died of the wounds. Stewart received no injury except a cut in his hand, made by his own knife, no doubt. When Dotey started towards Stewart, they were but a few feet apart, and the conflict lasted but a few seconds. It does not appear that Dotey had any weapon. He certainly attempted to use none. Stewart neither showed his knife, nor said that he had one, before using it. He appears to have concealed it from Dotey until he gave the fatal stabs.

Now it does seem clear to us that Stewart sought to bring on the affray, that he desired to be assaulted, and intended, if assaulted, to make good his previous threats of using his knife. True, he had a
75] right to dun Dotey for his money, but *he had no right to do so for the purpose of bringing on an affray in order to afford him a pretext to stab his enemy. There is some testimony tending to prove that Dotey went to the hotel that night to whip Stewart. It is not impossible that such was the fact; but if so, and the combat was mutual, the case is no better for the accused. Again, it does not appear that Stewart was, at any time, in danger of a serious injury, or that he apprehended it. There is no testimony tending to prove either the danger or the belief of it.

We have next to consider the refusal to charge as requested by the accused. He asked the court to direct the jury: "that if a man is attacked by a person of strength superior to his own, he is not bound to flee, but may use such force and such weapons as may be sufficient to resist the force employed against him, and if the assailant is killed, it is neither murder in the first or the second degree, or manslaughter." Which instruction the court refused to give. As to so much of this instruction as relates to the necessity of retreating, it was immaterial, for the reasons we have given. As to the residue of the instruction, if it had any application to the case, it amounted in substance to this, that Stewart, when assailed by an unarmed man, might repel the assault by the use of a deadly and concealed weapon, even though it might have been as well resisted by other means. The court were not asked to tell the jury that a man, in his defense, may employ sufficient force to repel the assailant. That they had already charged. But they were asked in effect to say that he may employ any weapon sufficient for that purpose. If this is so, a man upon whom an ordinary assault and battery is committed may pierce his assailant with a sword, or knock him down with an axe, for each of these is a weapon "sufficient to resist the force employed." We do not think such is the law.

The court were also asked to instruct the jury: "that if the killing arose from previous malice on the part of the defendant, and not from what occurred on the evening of the 9th of September, 1850, he can not be convicted as indicted"—*which [76 charge was given with the following modification: strike out "previous," and insert "deliberate and premeditated" in the place thereof. The charge, as asked, if we understand it, was, in effect, that if the jury found the crime was murder in the first degree, the prisoner could not be convicted under the indictment which only charged murder in the second degree; and the amendment of the court only made the proposition clearer. If there was error on this point it was in giving the charge at all. But the accused can not complain of this, as it was in his favor.

The accused also asked the court to charge the jury that, "in this state any man has a constitutional right to carry weapons for self-defense, and hence there is no presumption of malice from the carrying of a weapon such as the knife with which James R. Dotey was killed"—which charge was given with the following modifi-

cation: "That the jury may and ought to take into consideration the manner by which, and purposes for which the prisoner had the possession of the knife in question." This modification was excepted to, but we see no error in it.

The following charge was also asked by the accused: "That if the defendant had reasonable ground to apprehend danger to his life, or great bodily harm, he would have the same right to defend himself, whether there was actual danger or not"—which charge was declined on the ground that the court had already charged on the same point.

It was true that the court had so charged, and substantially as prayed for in the above instruction. We suppose it was not erroneous to refuse to repeat the charge.

The next assignment of error is that "the verdict of the jury is without evidence, and contrary to the evidence in the case." If we can consider this assignment at all, it is sufficient to say that the verdict was not without evidence nor contrary to the evidence—certainly not clearly so.

It is next assigned for error that "the verdict of the jury is against law." We do not think so.

77] The last assignment is that "the court erred in overruling *the motion for a new trial." The grounds upon which a new trial was asked were the same we have above considered. In our opinion the motion was properly overruled.

The judgment of the Common Pleas is affirmed with costs.

CORWIN, J., having been of counsel for the accused, on the first trial, did not sit in the above case.

THE CINNCINNATI, WILMINGTON AND ZANESVILLE RAILROAD COMPANY v. THE COMMISSIONERS OF CLINTON COUNTY.

It is the right and duty of the judicial tribunals to determine whether a legislative act drawn in question in a suit pending before them is opposed to the constitution of the United States, or of this state, and if so found, to treat it as a nullity.

In such case the presumption is always in favor of the validity of the law; and

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it is only when manifest assumption of authority and a clear incompatibility between the constitution and the law appear, that the judicial power will refuse to execute it.

The general assembly, like the other departments of government, exercises only delegated authority; and any act passed by it not falling fairly within the scope of "legislative authority," is as clearly void as though expressly prohibited.

The power of the general assembly to pass laws can not be delegated by them to any other body, or to the people.

The act of March 1, 1851, to authorize the commissioners of said county to subscribe to the capital stock of the relator, does not delegate legislative power or contravene the constitution of 1802, in providing that the subscription shall not be made until the assent of a majority of the electors of the county (except two townships) is first obtained at an election held for that purpose.

It was competent for the legislature under that constitution to construct works of internal improvement on behalf of the state, or to aid in their construction by subscribing to the capital stock of corporations created for that purpose, and to levy taxes to raise the means; and by an exercise of the same power to authorize a county to subscribe to a work of that character running through or into such county, and to levy a tax to pay the subscription.

Such a tax, when thus authorized, is not beyond the legitimate scope of local municipal taxation; nor is it opposed to art. 8, sec. 4, of the constitution, declaring that "private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner."

*The taxing power for such purposes, under that instrument, was an undeniable legislative function, to be exercised at the discretion of the general assembly, and subject to no limitation but that against poll taxes; and while this court is unanimous in the opinion that such laws involve a gross abuse of that power, it possesses no authority to control that discretion, or to correct such abuses by the exercise of a veto power on such legislation.

A majority of the electors of Clinton county having decided in favor of the subscription, and the same having actually been made before the adoption of the present constitution; and the commissioners having elected, in pursuance of said act, to deliver the bonds of the county to the company in payment of the subscription, and having become bound to do so, and afterward refusing upon demand to deliver them, and showing no cause for such refusal, except that the act aforesaid was of doubtful constitutionality; a writ of mandamus is the proper remedy to enforce the delivery.

This writ lies in all cases where the relator has a clear legal right to the per-

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formance of some official or corporate act by a public officer or corporation, and no other adequate, specific remedy.

THIS case is sufficiently stated in the opinion of the court. It was argued by *Henry Stanbery* and *Geo. E. Pugh*, attorney general, for the relator, and by *J. H. Thompson* and *R. B. Harlan*, for the defendants.

RANNEY, J. At the present term of this court an alternative writ of mandamus was allowed and issued in this case, to which the defendants have now made return. The return is demurred to by the relator.

The question is, shall a peremptory mandamus issue? The petition upon which the writ was allowed, shows that the petitioners were duly incorporated on the 4th of February, 1851, to construct a railroad from Cincinnati, by the way of Wilmington, in Clinton county, and other intermediate points, to the city of Zanesville, in Muskingum county, and that they have fully organized under their charter. That in pursuance of an act of the general assembly, passed March 1, 1851, to authorize the commissioners of Clinton county to subscribe to the capital stock of said company, the question of subscription was submitted to the qualified electors of the county at the April election in that year, and a majority obtained in favor of such subscription; all the provisions of the law in relation to notice, taking the vote, and certifying the result, having been duly observed. That the commissioners did, in obedience to the act, afterward, on the 23d day of May, 1851, subscribe in the name, and for, and in behalf of said county, the sum of two hundred thousand dollars, to the capital stock of the company; the company, at the same time, in conformity with the proviso in the second section of said act, agreeing, in writing, to pay all interest which might accrue on the bonds, to be issued by the commissioners in payment of the subscription. It further avers that, on the 4th of March, 1852, the commissioners then being in session, the company by their president applied to them to issue the bonds or obligations of the county in payment of the subscription, which they refused to do, or to comply in any manner with the provisions of said act. These allegations of the petition are all admitted by the defendants' return, and, in conclusion, they say: "These defendants, entertaining doubts in regard to the constitutionality of the

act of the general assembly under which said subscription of stock was made, and under which the issue of the bonds of the county is sought to be enforced, have hitherto declined to issue said bonds, and still decline so to do. Which refusal is placed solely upon the ground that the act in question is unwarranted by the constitution of the State of Ohio, and is therefore void."

As all these proceedings were had, and the obligation of the county, if any, incurred by the subscription, before the taking effect of the present constitution of the state, no question can arise under its provisions. The sole question for our determination, therefore, is, was the act of March 1st, 1851, warranted by the constitution of 1802, then in force?

This act differs in no important particular from a large number, passed by the general assembly of this state, for like purposes, within a few years past. It authorizes and requires the commissioners, with the consent of a majority of the voters of the county, to be expressed at the regular spring election of 1851, to subscribe to the capital stock of the company an amount not exceeding \$200,000, for the *payment of which they were authorized to [80 issue the bonds of the county for the amount, either directly to the company, or to borrow money upon, payable at such time as they should deem expedient, and at a rate of interest not exceeding seven per cent. But before any bonds were issued, the company was to agree in writing, to pay all interest that might accrue upon them, being entitled to receive the dividend from the stock, until they were redeemed; for which the faith of the county, and the profits from the stock were pledged; and the commissioners and auditor were required to levy such tax annually upon the property of the county as would meet any deficiency, and create a sinking fund of such amount as they deemed expedient. The commissioners were authorized to vote at the meetings of the company on the stock owned by the county, and to sell and transfer the stock to pay off the indebtedness, when they should deem it expedient.

Two townships were excluded from the right to vote, and also from the burthen incurred by the subscription.

The question thus presented is one of the very first importance, not only on account of the principles arising, but of the immense interests involved in its determination. Under these laws, bonds for many millions of dollars have already been issued, which have for the most part passed into the hands of *bona fide* holders. These

subscriptions by counties, cities, and towns, have induced subscriptions to a very large amount by individuals for works now in process of construction, which must inevitably fail, with great individual loss, if they are not enforced; on the other hand, the fact is not to be overlooked, that the indiscriminate prodigality with which grants of this kind have been made, is calculated to saddle the people of the state with a very heavy indebtedness, and in many instances to burden them with onerous taxation for many years to come. But these considerations, important as they must be conceded to be, can have no further influence upon our inquiries than to induce very careful and mature investigation and deliberation. 81] Aided *by the very elaborate and able arguments of counsel, we have endeavored so to consider the question, and have been enabled to arrive at a unanimous conclusion in favor of the constitutionality of the act in question, upon grounds entirely satisfactory to every member of the court.

The power and duty of the court, and the principles by which it should be guided in determining a question of this character, have been made the subject of much remark at the bar. It seems now, however, to be generally, if not universally conceded, that it is the right, and consequently the duty of the judicial tribunals to determine whether a legislative act, drawn in question in a suit pending before them, is opposed to the constitution of the United States, or of this state, and, if so found, to treat it as a nullity. How any doubt could ever have been entertained upon this subject, is matter of no little astonishment; and yet the history of our own state shows that the power was at one time not only doubted, but positively denied; and judges, for a fearless discharge of this duty, were subjected to impeachment by the house of representatives. The triumph of this great principle, vital to all constitutional government, must be attributed, in no small degree, to a clearer comprehension of the nature and purposes of fundamental laws, and the powers of the legislative body derived from them.

These laws, emanating directly from the fountain and source of all political power, serve not only to define the power, and as guides to the action of that body, but extend their protection, and to a great extent apply their provisions to the rights and interests of every individual citizen, who has at all times a right to invoke that protection when these rights and interests are invaded, and may rightfully and truthfully insist that, to this extent, he is placed

above and beyond the power of the government, created by the constitution.

To adjudicate upon and protect these rights and interests, constitute the whole business of the judicial department. Each judge, before he is permitted to enter upon so important *a duty, is [82 required to bind his conscience by a solemn oath to support these constitutions. After all this, when he is clearly convinced their provisions have been violated, and the rights of the individual secured by them have been invaded by a legislative enactment, he has but one of two courses to pursue—either to regard his oath, vindicate the fundamental law, and protect the rights of the individual citizen, or to give effect to an act of usurped authority. In such case, it can not be doubtful where the path of duty leads. The latter alternative can only be followed when we are to nullify all constitutional guaranties, and proclaim the legislative body, like the British Parliament, omnipotent. For, as stated by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation." "The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

But while the right and duty of interference in a proper case are thus undeniably clear, the principles by which a court should be guided in such an inquiry are equally clear, both upon principle and authority. It is never to be forgotten that the presumption is always in favor of the validity of the law; and it is only when manifest assumption of authority, and clear incompatibility between the constitution and the law appear, that the judicial power can refuse to *execute it. Such interference can never be per- [83 mitted in a doubtful case. And this results from the very nature of the question involved in the inquiry.

The legislature is, of necessity, in the first instance, to be the judge of its own constitutional powers. Its members act under an oath to support the constitution, and in every way under responsibilities as great as judicial officers. Their manifest duty is never to exercise a power of doubtful constitutionality. Doubt, in their case, as in that of the courts, should be conclusive against all affirmative action. This being their duty, we are bound, in all cases, to presume they have regarded it; and that they are clearly convinced of their power to pass a law before they put it in the statute book. If a court, in such case, were to annul the law while entertaining doubts upon the subject, it would present the absurdity of one department of the government overturning in doubt what another had established in settled conviction, and to make the dubious constructions of the judiciary outweigh the fixed conclusions of the general assembly.

The adjudged cases speak a uniform language upon this subject. The question was early brought to the attention of the supreme court of the United States. In *Hylton v. The United States*, 3 Dall. 171, Mr. Justice Chase declares, "if the court have such power, I am free to declare that I will never exercise it but in a very clear case;" and Mr. Justice Washington, in *Cooper v. Telfair*, 4 Dall. 14, says, "the presumption must always be in favor of the validity of the laws, if the contrary is not clearly demonstrated.

When it became necessary afterwards, in the case of *Maybury v. Madison*, to determine the question of power, the court did not hesitate, as we have seen, to exercise it, and to annul the law; but still adhering to the doctrine announced in the early cases cited, we find Chief Justice Marshall, at a later period, in delivering the opinion of the court in *Fletcher v. Peck*, 8 Cranch, 87, declaring, "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its 84] acts to be considered void. The opposition between the constitution and the laws should be such, that the judge feels a clear and strong conviction of their incompatibility with each other."

An unbroken chain of decisions to the same effect is to be found in the state courts. I shall refer to but few of them. In *Adams v. Howe*, 14 Mass. 345, the doctrine is thus stated: "the legislature is, in the first instance, to be the judge of its own constitutional powers, and it is only when manifest assumption of authority or misapprehension of it shall clearly appear, that the judicial power

will refuse to execute the law." And, again, in *Wellington v. Petitioners, etc.*, 16 Pick. 95, the same court announce their determination, "never to declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." The supreme court of Pennsylvania deny the powers of the courts to interfere to set aside a law, unless the legislature have encroached on ground which they are positively or by necessary implication forbidden to enter. 11 Penn. St. 70. And the court of appeal, in Kentucky, in the *City of Louisville v. Hiatt*, 2 Mon. 178, say, "if it be doubtful or questionable whether the legislative power has exceeded its limits, the judiciary can not interfere, though it may not be satisfied that the act is constitutional;" and, again, in *Lexington v. McQuillan's heirs*, 9 Dana, 514, "we should be justly chargeable with wandering from the appropriate sphere of the judicial department, where we, by subtle elaboration of abstract principles and metaphysical doubts and difficulties, to endeavor to show that such a power may be questionable, and on such unstable and injudicial ground to defy and overrule the public will, as clearly announced by the legislative organ."

But the authority of the general assembly is much too broadly stated, when it is claimed that all their acts must be regarded as valid, which are not expressly prohibited by the constitution. A moment's attention to principles, which must be regarded as fundamental in all the American systems of government, will demonstrate the unsoundness of such a *conclusion. One of these [85 principles, lying at the very foundation of these systems, and expressly asserted in section 1, article 8, of the constitution of 1802, is, that all political power resides with the people—that government is founded "on their sole authority, and organized for the great purpose of protecting their rights and liberties and securing their independence," and that "they have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary."

They have, therefore, the most undoubted right to delegate just as much, or just as little, of this political power with which they are invested as they see proper, and to such agents or departments of government as they see fit to designate. To the constitution we must look for the manner and extent of this delegation; and from that instrument alone must every department of the government derive its authority to exercise any portion of politi-

cal power. That instrument is the letter of attorney, by which alone they are authorized to act at all, and, in all cases, they must be able to show that their acts are authorized by it. To prevent the enlargement of this grant of power by construction or otherwise, we find it declared, in section 28 of the same article, "that all powers not hereby delegated remain with the people."

The people have thus granted certain political powers, to be exercised for their benefit, until they see fit to resume them, and have retained others. On looking into the constitution we find the granted powers assigned to three great departments of government—the legislative power to the general assembly; the executive power to the governor; and the judicial power to the courts. Unlike the constitution of the United States, and from the necessity of the case, no attempt at a specific enumeration of the items of legislative power is made. This must, therefore, always be determined from the nature of the power exercised. If it is found to fall within the general terms of the grant, we can only look to the other 86] parts of the constitution for limitations upon it: if *none are there found, none exist. But, as the general assembly, like the other departments of government, exercises only delegated authority, it can not be doubted, that any act passed by it, not falling fairly within the scope of legislative power, is as clearly void as though expressly prohibited. And we agree entirely with the supreme court of Pennsylvania in *Parker v. Commonwealth*, 6 Barr. 511, that "it is this species of insidious infraction that is more to be feared and guarded against than direct attacks upon any particular principle proclaimed as a part of the primordial law; for attempts of the latter description will generally be met by instant reprobation, while the stealthy and frequently seductive character of the former is apt to escape detection, until the innovation is made manifest by the infliction of some startling wrong." It is not my purpose to point out the numerous cases in which a legislative act might be avoided as transcending the limits of the powers delegated to that body, although not expressly prohibited. The attempted exercise of executive or judicial power, delegated to the other departments, will very readily suggest many instances, while many others may be easily imagined, of encroachments upon reserved rights, not surrendered to any department of the government.

From these considerations, it follows that it is always legitimate

to insist that any legislative enactment, drawn in question, is void, either because it does not fall within the general grant of power to that body, or because it is expressly prohibited by some provision of the constitution.

And this brings us to the specific objections relied upon to show the act in question a nullity. They are: 1st. That the act was not passed into a law by the general assembly, but was made to depend for its effect upon a vote of the people of Clinton county; and this involves an attempt on the part of that body to delegate legislative power. 2d. That the power exercised does not legitimately fall within the definition of legislative authority; and 3d. That the act is opposed *to certain express provisions of the constitution. [87 We shall consider these positions in the order thus stated.

I. That the general assembly can not surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or body, is a proposition too clear for argument, and is denied by no one. This inability arises no less from the general principle applicable to every delegated power requiring knowledge, discretion, and rectitude, in its exercise, than from the positive provisions of the constitution itself. The people in whom it resided have voluntarily relinquished its exercise, and have positively ordained that it shall be vested in the general assembly. It can only be reclaimed by them, by an amendment or abolition of the constitution, for which they alone are competent. To allow the general assembly to cast it back upon them, would be to subvert the constitution and change its distribution of powers without their action or consent. The checks, balances, and safeguards of that instrument are intended no less for the protection and safety of the minority, than the majority; hence, while it continues in force, every citizen has a right to demand that his civil conduct shall only be regulated by the associated wisdom, intelligence, and integrity of the whole representation of the state.

But while this is so plain as to be admitted, we think it equally undeniable, that the complete exercise of legislative power by the general assembly does not necessarily require the act to so apply its provisions to the subject-matter as to compel their employment without the intervening assent of other persons, or to prevent their taking effect only upon the performance of conditions expressed in the law.

Indeed, the whole body of our legislation, as well as that of every

other state, is divided between laws which imperatively command or prohibit the performance of acts, and those which only authorize or permit them. Time and space would both fail me to refer in detail to all of those of the latter description. A few, however, will serve to illustrate the whole. The county commissioners, in 88] each county, are *authorized, but not required to erect public buildings, and to erect and establish poor houses in their respective counties, and to levy taxes for these purposes. In these cases, with many others that might be mentioned, the discretion is vested in the county commissioners.

The school laws of this state have always allowed the householders and resident tax-payers of the school districts to determine by vote upon the erection of school-houses, and the imposition of the necessary taxes for the purpose; and a more recent law for the establishment of schools of a higher grade in cities and towns, has left to the electors of each town and city, respectively, the right to determine whether they should be put into operation within the limits of each. Of the same character is the law which leaves to the citizens of each township to decide upon the erection of a town house, while every act of incorporation ever passed necessarily refers the question of its acceptance to the incorporators; these all present cases where the discretion is left to the body of those interested, or to be affected.

But because such discretion is given, are these and all similar enactments to be deemed imperfect and nugatory? It would take a bold man to affirm it. In what does this discretion consist? Certainly not in fixing the terms and conditions upon which the act may be performed, or the obligations thereupon attaching. These are irrevocably prescribed by the legislature, and whenever called into operation, conclusively govern every step taken. The law is therefore, perfect, final, and decisive in all its parts, and the discretion given only relates to its execution. It may be employed or not employed; if employed, it rules throughout; if not employed, it still remains the law, ready to be applied whenever the preliminary condition is performed. The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and 89] in pursuance of the *law. The first can not be done; to the latter no valid objection can be made.

The act under consideration is mandatory in some of its provisions and leaves a discretion in others. It commands the vote to be taken, and if the subscription is made, it imperatively directs all the subsequent proceedings. But it submits to the discretion of the voters of Clinton county, who are chiefly interested and to bear the burden, if assumed, whether the subscription shall be made—and the law thus fully executed. But this power of deciding upon its execution so far from being contradictory to or inconsistent with the act, is the condition prescribed by the law-making power itself, upon which alone it is permitted to have effect. It is not the vote that makes, alters, or even approves the law, but, as well remarked by one of the counsel, it is the law that makes the vote and prescribes everything to be done consequent upon it.

But it has been claimed that a county is incapable of receiving such a power or executing such a duty. This position is based upon the assumption that counties can constitutionally be authorized to exercise such powers only as have belonged to them by immemorial usage. I am not aware of any provision of the constitution governing this case, which prescribes for what purposes they may be employed. But what is a county? It is not *imperium in imperio*, in any sense. It is invested as such with no single attribute of sovereignty, and, for reasons already stated, it can not be. Rightly considered, it is a mere instrumentality, a means in the hands of the legislative power to accomplish its lawful purposes; and to this extent a creature in the hands of its creator, subject to be molded and fashioned as the ever-varying exigencies of the state may require. It would seem to follow that it may, from time to time, be clothed with such powers, and charged with such duties of a local administrative character, not vested elsewhere by the constitution, as the general assembly may see fit to direct. And so they have always been treated and used. Scarcely a year of our legislative history has passed which has not added to and taken from them *powers and duties of this character. The legisla- [90
ture might perform their duties directly, but, for the most obvious reasons, could not as understandingly and efficiently do it, as by the employment of those subordinate agencies. Whether the act in question confers powers and duties of the character above indicated, or such as the legislature had power to confer, belongs to another part of this inquiry.

These views lead to the conclusion that an enactment is not imi-

perfect which makes its execution depend upon the contingent approval of persons designated in it, and that a county organization may be clothed with this discretion; and if the commissioners, the agents of the county, may exercise it, it seems too clear to be doubted that it may be conferred upon the body of those they represent.

We are therefore of the opinion that the act in question does not delegate legislative power, or contravene the constitution in providing that the subscription should not be made until the assent of a majority of the electors of Clinton county was first obtained; and we know of no adjudged case that conflicts with the views we have expressed, or the conclusion to which we have arrived. The case of *Rice v. Foster*, 4 Harr. 479, decided by the court of appeals of Delaware, in June, 1847, and of *Parker v. The Commonwealth*, 6 Barr, 507, by the supreme court of Pennsylvania a few months later, are very strongly relied upon by the defendant's counsel. We have very carefully considered these cases, and although the question presented was not free from difficulty, as is manifest from the nearly equal division of the later court, we are of opinion they were rightly decided. The facts in each case were the same. Existing laws in each state provided for granting licenses to tavern-keepers and retailers of spirituous liquors. The acts in question, and which were held invalid, submitted to the voters of each township to decide whether licenses should continue to be granted in such township; and if decided against, the sale was made criminal. This, in effect, submitted the question whether the license laws [91] should be repealed and a criminal *prohibition take their place. To repeal a law requires the same exercise of power as to enact it; and the one can no more be delegated than the other. The voters in these cases were not called upon to determine upon the execution of a law under and in conformity to its provisions, but whether the law itself should continue to exist. That this was the view taken and that they did not intend to press the doctrine to the extent now claimed, is most manifest from the opinions delivered, and especially from the latter decisions of the Pennsylvania court. In the Delaware case, in answer to the arguments drawn from the school laws, and after citing many instances of good conditional laws, the Chief Justice says: "A law altering, abridging, or enlarging the vested powers of corporations aggregate, subject to the consent of said corporation, or a law giving to school dis-

tricts a portion of the school fund on condition that such districts will raise an equivalent or proportional sum, are all instances of proper conditional legislation, even though the assent of the corporators in the one case to the change of their charter, or of the district, in the other, to accept the donation and comply with its terms, should be signified by a majority vote. These are all good conditions, capable of being performed without in any way interfering with the legislative will. But a law declaring an offense, or providing a punishment, or repealing an existing law on condition that the governor or any other individual shall assent to it, is as plainly unconstitutional. It is the naked veto power."

And, again: "To say that the authority given to the school voters, the members of a corporation to determine whether a tax shall be laid or not, is a grant of legislative power, is an abuse of language. Legislative power is the power of making laws. The making of a law, prescribing by what persons, or by what body, when, and in what manner taxes should be laid and collected, is the exercise of a legislative power. But the making of a resolution or order, or the determination or direction by the persons or body appointed for such purpose by the law, that taxes shall be laid and *col- [92] lected, is simply the execution of an authority granted by statute."

In answer to a similar argument in Parker's case, it is said: "But here an obvious distinction is to be observed. A law designating the persons, or bodies of persons, by whom a tax may be imposed, and the mode in which it shall be collected and distributed, requires the authority of the constitutional law-maker, for it is a rule of action prescribed. But the act of the designated persons or bodies depends, for its authority, altogether upon the law commanding or permitting it."

"Of the illustrations furnished by our statute book of this distinction, may be mentioned the laws empowering county commissioners and supervisors of townships to assess and levy taxes for county and township purposes respectively. In these cases deliberation, judgment and discretion are to be employed, and there are many facts to be determined, but the right to determine is derived from the statute. But this is a very different right from that sought to be drawn from a concession of power to enact a penal statute, under which the citizen may be indicted and punished."

This case subsequently came under review in the case of *The Commonwealth v. The Judges of the Court of Quarter Sessions*, 8

Barr, 391, and *Commonwealth v. Painter et al.*, 10 Barr, 214, in each of which it was claimed that the principle settled in *Commonwealth v. Parker* would annul the law, and in each the claim was disallowed. The first arose under a law submitting to the voters of a township, which had been divided, the question whether the new township should be continued or be annulled. The voting having resulted adversely to its continuance, it was claimed the act involved a delegation of legislative power, as settled in *Parker's* case. To this the same judge who delivered that opinion replies: "This opinion is founded in an entire misapprehension of the doctrine of that case. That the erection of a township, or the creation of a new district for merely municipal purposes, or convenience in the *transaction of the public business, is in no degree [93] similar to the exercise of the law-making power. The one is an exercise of sovereignty, the other in its very nature a subordinate function. The latter, like the laying out of a public road or highway, or the erection of a bridge, may require the exercise of judgment and skill; but there is nothing either in the positive provisions of our constitution or the genius of our institutions which prohibits the action of other than legislative bodies."

And to the further objection that the act conferred the power upon the electors, instead of a judicial court, it is said: "But if the legislature can authorize the courts to decide questions of this character, they can also authorize the people primarily to do so. The difficulty is simply in the right to impart the power to act. If it can be given to a selected few it may also be delegated to all the inhabitants of a district, unless positively prohibited."

In the last case cited, the law submitted to the electors of a county the question of the removal of the county seat. The law was held valid, and the question considered to be settled by the case in 8 Barr.

I have been thus particular in noticing the decisions of these two courts, because their authority is solely relied upon by the defendant's counsel. Fairly considered, they contain nothing opposed, but much in affirmance of the views we have expressed. I can only refer to the decisions of other courts of equal respectability in point, to sustain the positions we have taken.

In the case of the State on relation to *Caldwell v. Reynolds*, 5 Gilman, 1, a law providing for the division of a county and the formation of a new county from the same territory, to take effect only

upon receiving a majority vote, was sustained by the supreme court of Illinois, in a very clear and forcible opinion. The very question now under consideration was decided in favor of the law, by the court of appeals in Kentucky, in the case of *Talbot v. Dent*, 9 B. Mon. 526, and affirmed by the same court in *Slack v. *The [94 Maysville and Lexington Railroad Co.,* decided in 1851. In this case, Judge Marshall, delivering the opinion, says: "It is not essential to the character and force of a law, that the legislative enactment should itself command to be done every thing for which it provides. The legislative power to command a particular thing to be done includes the power to authorize it to be done. The act done under authority conferred by the legislature is precisely as legal and valid as if done in obedience to a legislative command."

"So far as such a statute confers authority and discretion, it is as obligatory from the first as the legislative power can make it; and although its further practical efficiency may depend upon the discretionary act of some other body or individual, it is not derived from that discretion, but from the will of the legislature which authorized the act, and prescribed its consequences."

II. Does the object proposed by this law, and the method adopted for its accomplishment, fall within the legitimate scope of legislative authority? Its object and effect may be defined to be an authority to the county of Clinton to aid in the construction of a railroad passing through it, by subscribing to the stock.

We shall take for granted, as a predicate upon which to found all reasoning upon this subject, that the state may lawfully construct roads, canals, and other descriptions of internal improvement, calculated to facilitate the social and business intercourse of the people, and to develop its resources and add to its strength and security.

However theorists may have assigned to government a more restricted sphere of action, it is certain that this power, like the power of establishing and supporting schools, and providing for the poor, insane, and unfortunate, presenting it in its more beneficent aspect, has always been exercised by every civilized state, and must be held to be included in the general delegation of power in our own. If we needed confirmation of this, it would be found upon almost every page of our legislative and judicial history; while near twenty millions *of existing indebtedness, in addition [95

to the many millions already paid, incurred for these objects, would remind us of its constant and continued exercise.

It is true that in early times only wagon and turnpike roads were constructed; but it would be strange imbecility to fasten upon government, to deny it, in the attainment of the same ends, the use of such improvements as science and discovery have brought within its reach.

In accomplishing the lawful purposes of legislation, it must be admitted that the choice of means adapted to the end proposed, and not prohibited by the constitution, must be left exclusively to the discretion of the legislative body. And, unless we are prepared to overthrow the practice of the state and its judicial affirmance for half a century, it must be further admitted that the incorporation of private companies for the construction of works of a public character is one of the lawful means that may be employed. It is upon this principle, and this alone, that they have always been invested with the power to exercise the right of eminent domain by taking the necessary ground upon which to construct these works. This right has never been questioned, except as to the terms of compensation upon which it might be used; and, after so long an experience, the people have expressed their approval of it, in the adoption of the present constitution, which confers it expressly, under, however, most important safeguards for the correction of abuses which had grown up.

If, then, the general assembly may lawfully embark the state in the construction of these works, and, especially, if it may authorize private companies to construct them, and they still retain their public character, it would seem to follow, for much stronger reasons, that it might authorize the counties to construct those of a local character, having especial relation to their business and interests. These political organizations are created for no private object. They are, as we have seen, public instrumentalities, invested with such local administrative functions as the legislature 96] see fit, from time to time, to confer upon them; and having the power to provide for the construction of such work directly and absolutely, it is most unquestionable that it has the power to attain the same end indirectly and conditionally through these subordinate agencies.

And such has been the constant course of our legislation. From an early period the whole power of laying out, establishing, and

keeping in repair, by a local tax, the public roads, has been confided to the several counties. For this purpose they have taken private property and levied taxes, and the power to do so has never been questioned by any one.

But it is insisted that the method adopted by the law, of subscribing to the stock of a corporation created to construct the road, is unwarranted and illegal—that the public can only be taxed for the construction of works which, when completed, belong exclusively to the public; and that to hold otherwise is to make the property of the citizen liable to be taken and taxed for any private enterprise whatever, and to compel him, willing or unwilling, to become a member of a private corporation. The inference drawn in the argument thus stated, is altogether unwarranted. It is only such works of a public character as the state itself might make, or authorize the counties to make, that can be aided by subscribing to the stock of a corporation; nor does the citizen in any manner become a member of the corporation. Where the right of eminent domain stops, there the right to incur any obligation for the public stops. But in its just application to this and like cases, as a question of expediency, the argument is entitled to much weight. It is not, however, expediency, but constitutional power, with which we have to deal. The latter consideration only has been entrusted to us, while the former belongs exclusively to the legislature.

This objection has a much wider application than might be at first supposed. Millions of the debt of the state has been contracted in this very manner, by subscribing to the stock of turnpike, railroad and canal companies. Are *these debts all void, and [97 the interest of the state in these works lost? Such would be the unavoidable consequence of giving effect to this objection; for, as we have already settled, whatever method the state may lawfully adopt, it may authorize the counties to adopt, to attain the same end. But the position is untenable upon principle. The state might construct, or authorize the counties to construct these works entire; or it might create corporations to do it entire. This would be adopting different, but lawful means to effect the same lawful object. If, then, either might do the whole, is it not too obvious for doubt, as a question of power, that each may be authorized to do a part? Does not the whole necessarily include the parts, or can the exercise of a power be impeached, because it is not exercised to the full extent authorized? And may not different, but harmonious

agencies be employed, at the discretion of the legislature, to effect the object? We think they may. It is very true that the whole pecuniary interest of the work does not belong to the public when completed. But it belongs to them in exact proportion to the amount they have contributed to its construction, which is all that justice requires, and all that they have seen fit to exact.

While this question seems to us clear upon principle, we find ourselves confirmed in the conclusion to which we have arrived, by the unanimous opinions of all the state courts in which it has arisen. The case of *Bridgeport v. The Housatonic Railroad*, 15 Conn., 475, was decided by the superior court of that state, under a law conferring upon the city of Bridgeport the power to subscribe one hundred thousand dollars to the capital stock of the defendant, and to pledge the credit of the city therefor. This law was claimed to be unconstitutional, but the court sustained it, and held that it empowered the city to issue its bonds for stock in the road and enforced their collection.

The case of *Commonwealth v. McWilliams*, 11 Penn. St. 61, arose 98] under a law of that state, conferring upon the *trustees of certain townships the power to subscribe, on behalf of their townships, to the capital stock of a turnpike company. Franklin township made the subscription, and levied a tax to pay it, which was resisted upon the ground that the act was unconstitutional. The court overruled the objection and enforced the tax. In the course of the opinion, and after founding the right to make the subscription upon the power of maintaining ordinary roads, it is said: "A very signal instance of the exercise of a similar power is afforded by the recent act of the 27th of March, 1848, authorizing the city of Philadelphia, the county of Alleghany, the cities of Pittsburgh and Alleghany, and the municipal corporations of Philadelphia county, to subscribe for shares of the capital stock of the Pennsylvania Railroad Company, to borrow money to pay therefor, and to pay the principal and interest of the sum so borrowed. The exercise of this authority may, of course, entail additional taxation on the inhabitants of the several places designated. Yet, though before the enactment, the right of a municipal corporation to subscribe to the stock was strongly contested, no one has doubted it since, and on the faith of this legislation, millions of dollars have been subscribed."

The question arose in the state of Virginia, and was decided by

the court of appeals, after a very able discussion at the bar, in the case of *Goodin v. Crump*, 8 Leigh, 120. The city of Richmond, under authority from the legislature, had subscribed to the stock of the James River and Kanawha Company, incorporated for the purpose of uniting the navigable waters of James river with the Ohio by a canal or railroad. A tax being levied to pay the interest, Goodin filed his bill to enjoin its collection. The court dismissed the bill, and affirmed the power of the legislature to enlarge the corporate powers of the city, with the assent of a majority, so as to enable it to incur this obligation, and bind the minority. In answer to the objection that the work was not confined to the corporate limits, and after stating the true test of the corporate character of the act to be the *interest* of the *corporation, and not whether [99 the work is wholly within it, it is said: "If then, the test of the corporate character of the act is the probable benefit of it to the community within the corporation, who is the proper judge whether a proposed measure is likely to conduce to the public interest of the city? Is it this court, whose avocations little fit it for such inquiries? Or is it the mass of the people themselves—the *majority of the corporation acting* (as they must do if they act at all) *under the sanction of the legislative body?* The latter, assuredly."

In Tennessee, a law authorizing the city of Nashville to subscribe to the capital stock of a railroad company, was sustained by the supreme court of that state, in *Nicol v. Mayor and Aldermen of Nashville*, 9 Hump. 252.

The subject has several times been before the court of appeals in Kentucky, where it has been very thoroughly investigated, and treated with great ability.

Talbott v. Dent, 9 B. Mon. 526, was an action of replevin to try the validity of a tax levied to pay a subscription made by the city of Louisville to the stock of the Louisville and Frankfort Railroad Company, in pursuance of an act of the legislature, with the assent of a majority of the qualified voters of the city. The court held that the legislature had constitutional authority to grant to town or city corporations the power to tax for the construction of works of internal improvement, by which the facility of access to, and transportation to and from them, was promoted; and that a railroad was such a work. After citing the authorities in support of this position, Chief Justice Marshall remarks:

"These cases decide what must, we think, be conceded, that, in

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order to characterize a particular work or expenditure as being within the legitimate local purposes of a local municipal corporation, it is not necessary that the work or expenditure should be confined to the local limits of the corporation ; but that in the case of a road or canal leading to or near the city, and obviously tending to facilitate its commerce, and secure or increase its commercial [100] business *and prosperity, as well as the case of an aqueduct or sewer tending to promote the health and comfort of the city, it is sufficient that the object to be accomplished be so connected with the city and its interests, as to conduce obviously and in a special manner to their prosperity and advancement."

The principles of this case were also affirmed at the same term, in *Cheaney v. Hoover*, 9 B. Mon. 250.

The whole subject came again under review in the very recent case of *Slack et al. v. The Maysville and Lexington Railroad Co.*, already referred to for another purpose. The case involved the validity of an act of the legislature, under which the county of Mason, in pursuance of a majority vote of the qualified electors, had subscribed \$150,000 to the stock of that company. The court affirmed the previous decisions, and sustained the law. Upon the questions whether the road was an object of such a character as the legislature might constitutionally authorize or require a tax upon the counties through which it passed, or whether the tax should be local or general, or was equally laid, they regarded as belonging in a peculiar manner, as questions of fact and opinion, to the legislative department, which could alone exercise that power, and subject to no control by the judiciary, unless under color of the taxing power, it was really and substantially a taking of private property without compensation. That "perfect equality of taxation is unattainable, and could not be secured even if the judiciary were to take part in framing the laws which impose it; and the other points above referred to are so emphatically and exclusively the subjects of legislative judgment and discretion, that when it may be assumed that these have been fairly or actually exercised, in the imposition of a tax, there can scarcely be a possible ground for judicial interposition.

It thus appears that subscriptions provided for in the act under consideration, made by townships, cities, and counties, have all been sustained by highly respectable judicial tribunals as often as the question has arisen. Without a single adjudged case

to the contrary, we ought certainly to be able *to give very [101 good reasons before coming to a contrary conclusion. Such reasons, we apprehend, do not exist. The state had unlimited power to construct improvements of this character; and the selection of means and agencies to be employed for the purpose was left exclusively to the general assembly. Counties and private corporations might lawfully be employed as such means and agencies, and invested with such powers as were necessary to accomplish the object. Either might be authorized to construct such a work entire; but, being consistent and harmonious, both might be used, as in this instance, to effect the same object; the work, when constructed, being public in its character and purposes.

III. It is next contended that this act violates art. 8, sec. 4, of the constitution, which provides: "Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner."

It is certain that it contemplates a contingent necessity of resorting to contributions from the property-holders of the county to discharge the obligation incurred; and equally certain that it does not provide any pecuniary equivalent for such contributions.

If, therefore, this section has any application, the objection is well taken. To settle this point, it is necessary to determine which of two rights are called into exercise—the right of *eminent domain*, or the right of *taxation*. These rights, with which every government is necessarily invested, rest upon the same foundation, and are in many respects alike, while in others they are very clearly distinguishable. They are both rights which the people collectively, either expressly or impliedly, retain over the property of individuals to take so much as may be necessary to enable government to accomplish its lawful purposes; and the remarks of Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514, are equally applicable to both, when he says: "The power of legislation, and consequently of taxation, operates upon all the persons and property belonging to the body politic. *This is an [102 original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner is granted to individuals or corporate bodies."

But neither can be classed among the independent powers of

government, or included in its objects or ends. No government was ever created for the purpose of taking, taxing, or otherwise interfering with the private property of its citizens. But charged with the accomplishment of great objects, necessary to the safety and prosperity of the people, these rights attach as *incidents* to those objects and become indispensable *means* to the attainment of those ends. They can only be called into being to attend the independent powers, and can never be exercised without an existing necessity. If, therefore, property is taken, or a tax levied without the existence of some legal and clearly defined purpose to which to apply it, there can be no doubt it would involve a usurpation of authority, which would render either illegal.

These rights are alike in another particular. While in each private property is taken, in each compensation is made. But here the parallel ends: the indispensable condition fixed by the constitution to the exercise of the right of *eminent domain*, is that the compensation be made in money; while the compensation secured to the individual for property taken by taxation consists in the protection which the government affords to his interests, and the increased value of his property arising from the use to which the government applies the money raised by the tax.

The distinctions and the reasons for them in the exercise of these two rights, is thus clearly and forcibly stated by Judge Ruggles in delivering the opinion of the New York court of appeals in the case of *The People v. Mayor, etc., of Brooklyn*, 4 Comst. 423:

"Taxation exacts money, or services, from individuals, as 103] *and for their respective shares of contribution to any public burden. Private property taken for public use by right of eminent domain, is taken not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay, otherwise than in the proper application of the tax.

"Taxation operates upon a community, or upon a class of persons in a community, and by some rule of apportionment.

"The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals."

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With these considerations in view, there is no difficulty in seeing that it is the right of taxation, really and substantially, and not merely colorably, which is authorized to be exercised by this law, and that the constitutional provision referred to has no application to the case. On referring to the constitution of 1802, but a single express limitation upon the right of taxation is found. Article 8, section 23, affirms: "That the levying of taxes by poll is grievous and oppressive; therefore the legislature shall never levy a poll tax for county or state purposes." This only confines the legislature to the just principle of laying the public burdens upon property instead of persons.

It is not pretended that this provision has been invaded; beyond this, and within the limits already indicated for the application of money raised, the power has no definite boundaries. As stated by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 428: "The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the government acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government the right of taxing themselves and their property; and as the exigencies *of the [104] government can not be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislature and the influence of the constituents over their representatives to guard them against its abuse."

Now, we have already settled that this was a work of such public character as the legislature might lawfully accomplish, either in whole or in part, under the general grant of power to that body, or might authorize a county to do the same; that this might be done by any means not prohibited, adapted to the end in view; that a subscription of stock to a company incorporated for the purpose was not objectionable. If the obligation might thus be lawfully incurred by a county, it would seem to be too plain for a moment's hesitation that the necessary means might be raised by taxation to liquidate it. To the objection that this tax should be general and not local, inasmuch as the work was not confined to the local jurisdiction, it ought to be sufficient to refer to the cases we have already cited, in each of which the objection lay with the same force as in this. As a general rule, those who receive the benefit should bear the burden. If the benefit is general, the tax

should be general ; if otherwise, local. But who should settle this question ? The general assembly, clothed with the most ample discretion, with the assent of the locality to be taxed, or this court, invested with no discretion whatever ? The general assembly and the people of Clinton county, upon full information, as is to be presumed, have decided it. How it is expected that we, without either the means of information or the power, should reverse that decision, we are unable to comprehend. We conclude with the Virginia court, that "without entering into the inquiry whether the subscription was for their benefit or not, that they were the proper judges, subject nevertheless to that control which necessarily exists in the charter granting the power."

As a consequence, the tax provided by this law is not beyond the legitimate scope of local, municipal taxation authorized to be 105] employed by that constitution, nor opposed to any provision in it. And while experience has fully demonstrated the necessity of further limitations upon the exercise of a right so liable to abuse, and while we are all of opinion that laws of this character involve a gross abuse of right, for reasons which have led to their prohibition in the present constitution, and which need not be repeated, yet this court possesses no power to interpolate such limitations, or exercise a veto power upon such legislation.

This subscription having been made with the assent of a majority of the electors of Clinton county, and the county having thereby become absolutely bound by contract, before the adoption of the present constitution, and the commissioners, in pursuance of the law, having elected to deliver the bonds of the county to the company, in payment of the subscription ; and afterwards, upon demand, refusing to do so, and showing no cause for such refusal, except that the law was of doubtful constitutionality ; we are of opinion that a writ of mandamus is the proper remedy to enforce the delivery.

It is now too well settled to require a reference to authorities, that this writ lies in all cases where the relator has a clear legal right to the performance of some official or corporate act by a public officer or corporation, and no other adequate specific remedy.

Peremptory mandamus awarded.

Steubenville & Indiana R. R. Co. v. Trustees of North Township.

THE STEUBENVILLE & INDIANA RAILROAD COMPANY v. THE TRUSTEES OF NORTH TOWNSHIP, HARRISON COUNTY.

An act of the general assembly, authorizing the trustees of a township through which a railroad was to be made, to subscribe, on behalf of the township, to the capital stock of the railroad company, is not in conflict with the constitution of 1802.

THIS case is essentially similar to that of *The Cincinnati, Wilmington and Zanesville Railroad Co. v. The Comm'rs of Clinton Co.*, and both causes were argued *together. The only point [106 made in the defense was that the law authorizing the subscription conflicted with the constitution of 1802. If there was no such conflict, the respondents were content that a peremptory mandamus should be awarded.

Moodey, Henry Stanbery and Pugh, attorney general, for plaintiffs; *Peppard*, for defendants.

BY THE COURT. We see no difference in principle between a county and township subscription. We have decided the former to be binding in the case of *The Cin. Wilm. and Zanes. R. R. Co. v. The Comm'rs of Clinton Co.*, and for the same reasons given in that case, we must hold the latter to be valid. A peremptory mandamus must be issued.

Peremptory mandamus awarded.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OHIO,

JANUARY TERM, 1853.

PRESENT :

HON. WILLIAM B. CALDWELL, CHIEF JUSTICE.	
HON. THOMAS W. BARTLEY,	}
HON. JOHN A. CORWIN,	
HON. ALLEN G. THURMAN,	
HON. RUFUS P. RANNEY,	
	JUDGES.

THE HEIRS OF SAMUEL STOVER v. THE HEIRS OF WILLIAM BOUNDS.

Where the owner of a certificate of entry of land from the United States assigns such certificate as security for a debt, with a condition of defeasance, on the payment of the debt, such assignment creates an equitable mortgage on the land covered by such certificate.

Where the assignee of such certificates sells the same to a person who has notice of the terms on which it was first assigned, such subsequent assignee will hold the same subject to the right of the original assignor to redeem.

The right of the original assignor to redeem will not be affected by a provision in the condition of defeasance, that his right to redeem is limited to a fixed time after the transaction. Once a mortgage, always a mortgage.

BILL of review reserved in Licking county.

Heirs of Stover v. Heirs of Bounds.

The controversy arises between the parties as to the title to one hundred and sixty-nine acres of land in the county of Licking.

*This land was purchased from the United States in 1816. The [108 price was \$839, of which \$209 were paid in cash; the residue, in accordance with the law then in force, was to be paid in installments. A certificate of the entry and payment of the first installment was obtained by the person making the entry. This certificate was shortly afterwards purchased by William Bounds, who went into possession of the land and commenced improving it. In December, 1824, Bounds, being indebted to John Edwards, assigned to him this certificate. Edwards gave Bounds a writing, under seal, in which, after reciting that Bounds had executed a note to Edwards for \$183, which note was secured by a mortgage on a tract of one hundred and seventy acres of land, which was encumbered by a prior mortgage, it was agreed that if Bounds should, before the first day of March then next, remove the prior mortgage from this tract of land, that then the certificate should be re-assigned to him. The certificate was left in the hands of William Stanbery, the attorney who drew up the writing above referred to, who retained it until after the first day of March, and then delivered it to Edwards, Bounds not having performed the conditions on which he was to have a re-assignment of the certificate. Shortly afterwards, in April, 1825, Edwards sold the certificate to Samuel Stover, who paid off Edwards' claim against Bounds, forcibly ejected Bounds from the premises, took possession, paid up the instalments of purchase-money due the United States, obtained a patent for the land, and continued in possession until the time of his death, in 1835.

Bounds, after being ejected from the land, continued to live in the neighborhood for more than a year, when he left his family and went to parts unknown, and has not been heard of for a number of years.

The bill was filed by the children and heirs of William Bounds, against the children and heirs of Samuel Stover and others claiming title through him.

The late supreme court on the circuit, in Licking county, decreed in favor of Bounds' heirs and permitted them to redeem the land.

*Two errors are assigned by the heirs of Stover on their [109 bill of review :

First. That the court erred in finding that Samuel Stover held this property as mortgagee.

Second. That the testimony does not show that William Bounds was dead at the time of filing the bill.

William Stanbery, for complainant in review. 1 Vesey, 278; *Hunt v. Ten Eyck*, 2 Johns' Chy. 100; 1 P. Williams, 261; 2 Atk. 303; 2 Fonb. 260.

H. H. Hunter and *Henry Stanbery*, for defendants in review. *Ludlow's Heirs v. Kidd's Heirs*, 2 Ohio, 381; *Stevens v. Hey*, 15 Ohio, 317; *Lea v. Carpenter*, 16 Ohio, 417.

CALDWELL, C.J. The first question arising in the case is whether the assignment of the certificate by Bounds to Edwards constituted a mortgage.

The writing given by Edwards to Bounds, at the time of the assignment, gave the right in express terms to Bounds to redeem, by the performance of the condition, any time before the first of March then next following.

It was then clearly a mortgage, whilst the right to redeem by the terms of the contract existed, and being once a mortgage, it always remained such, as well after as before condition broken. But it is said by complainants in review that, if it could be held to be a mortgage, it was only a mortgage of a personal chattel, and that the sale of the certificate by Edwards to Stover, after condition broken, vested in Stover a clear and indefeasible title. Now, it is true that a certificate of this kind does not create a complete title to land; still its whole object and effect is to create a claim or title to real estate, and it has no value except so far as it effects that object. It gives the party to whom it belongs the right to enter and hold the land, the right to obtain a complete legal title to the exclusion of all other persons, and is a title to the land, although not a perfect one. We suppose, then, that Edwards, by the assignment of the certificate, obtained an equitable claim on the land, subject to the right of Bounds, the mortgagor, to redeem; and that Stover, having notice of Bounds' rights, took the certificate subject to the same condition.

As to the second error assigned, we would merely remark that the evidence shows that Bounds had not been heard from for more than seven years before the commencement of the suit, and might be presumed to be dead, and his heirs entitled to bring suit for the land.

It is also objected that no process was issued on the amended

bill. We know of no rule of practice that requires defendants who are in court to be served with process to answer an amended bill.

We see no error in the decree of the supreme court; the bill of review will therefore be dismissed.

Bill dismissed.

JOHN WHITE, JR. v. SAMUEL DENMAN AND OTHERS.

Under the judicial construction of the registry law of 1831, which has prevailed in this state for some years past, a mortgage which is not duly executed and delivered for record, has no validity, either in law or equity, against a judgment lien. And although this is at variance with the former analogies of the law, yet, inasmuch as it has become a rule of property in settling priorities among creditors, the court, acting upon the maxim *stare decisis*, which is a safe and established rule of judicial policy, will not disturb it.

Where a mortgage is defective in its execution by having the name of but one witness subscribed to the attestation clause, the official signature of the justice of the peace to his certificate of acknowledgment will not, under the statute, answer a double purpose and supply the deficiency in the attestation.

The court will not consider the question whether relief can be granted in chancery on the ground of mistake without the requisite allegations in the bill to bring the party within the rule of equitable relief under this head of equity jurisdiction.

THIS is a bill of review, reserved in the district court in Athens county, for decision in the supreme court.

The bill seeks the reversal of a decree rendered by the late supreme court in bank, at the December term, 1847, *dismiss- [111 ing the original bill of the complainant, reported in 16 Ohio, 59.

The defendant, Samuel Denman, executed a mortgage to the complainant, on certain real estate in the county of Athens, to secure the sum of \$3409, money lent and advanced upon the faith of this mortgage security. The instrument bears date January 22d, 1844, and was, in all respects, duly executed and acknowledged, except that the name of only one witness was subscribed to the attestation clause. The justice of the peace who took the acknowl-

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edgment and subscribed his certificate thereof, omitted to subscribe his name to the attestation. The mortgage in this form was duly recorded on the 30th day of the same month.

Subsequently, judgments at law were recovered against Denman in the court of common pleas of Athens county. The subsequent judgment creditors were made parties to the original bill, which sought to reform the mortgage and enforce it as a lien preferable in equity to their judgments. But the late court in bank held that, the mortgage being an imperfect one, the liens of the subsequent judgments upon the premises mentioned were superior in equity, as well as at law, to the mortgage lien of complainant.

To reverse this decree, and reinstate and reform the mortgage, and give it superiority over the subsequently acquired judgment liens is the object of this bill of review.

Convers, Welch and Jewett, for complainants in review: *Manly v. Hunt*, 1 Ohio, 257; *Norton v. Beaver*, 5 Id. 181; 18 Id. 568; 5 Paige, 280; 4 Id. 9; 3 Id. 117; 6 Id. 347; 2 Id. 217; 1 Green Ch. 254; 2 Call, 103; 1 Peck, 164; 3 Story, 447; 1 Vesey, jr. 477; 4 Price's Exch. 99; 2 Peere Williams, 277; *Barr v. Hatch*, 3 Ohio 538; 7 Id. pt. 1, 21; 10 Id. 415; 17 Id. 500; 1 Pet. 441; 9 Vesey, 106; 2 Story's Eq. 596; 4 Dana, 258; 1 Mason, 192; 2 Schoale's & Lefroy, 374; 3 Powell on Mort. 1049; 11 Vesey, 600.

112] **W. G. Brown*, for defendants; *Stannsell v. Roberts*, 13 Ohio, 148; 14 Id. 428; 14 Id. 514.

T. Ewing, for complainant.

BARTLEY, J. The main question presented in this cause is whether a defectively executed instrument, which may be operative as an equitable mortgage, can be set up in chancery to defeat a subsequent judgment lien. It is to be regretted that the adjudications bearing upon this question in Ohio have not been more uniform and satisfactory.

It is a principle of familiar application in equity jurisprudence, that a specific equitable interest in real estate, whether it be created by an executory agreement for the sale and conveyance of land, or by a deed so defectively executed as not to pass the legal estate, but treated in equity as a contract to convey, or even a vendor's lien, is upheld by courts of equity, and uniformly take priority, not only over judgment liens, and assignments in bankruptcy, but also assignments for the benefit of creditors generally. This doctrine

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was recognized as early as the case of *Manly v. Hunt et al.* 1 Ohio, 257, and has been affirmed by a series of adjudications in this state ever since. *Norton v. Beaver*, 5 Ohio, 181; *Barr v. Hatch et al.*, 3 Ohio, 538; *Minns v. Morse et al.*, 18 Ohio, 568. The same principle is well established in other states: *Ellis v. Townsley*, 1 Paige, 280; *Gouveneur v. Titus*, 6 Paige, 347; *Hoagland v. Latourette et al.*, 1 Greene (N. J.) Ch. 254; *Eppes v. Randolph*, 2 Call, 103, 154; *Everett v. Stone et al.*, 3 Story, 447; *Lodge v. Tysely*, 4 Sim. 70; 2 Story's Eq. sec. 1503. The principle has always prevailed in England: *Finch v. Winchelsea*, 1 Peere Williams, 277 (case 66); *Prior et al. v. Penpraze*, 4 Price Exch. 99; S. C. 2 Cond. Eng. Exch. 46; *Legard v. Hodges*, 1 Vesey, jr. 477.

The question whether an equitable mortgage should be placed on any different ground in Ohio has been much controverted.

*In the case of the *Bank of Muskingum v. Carpenter's Ad- [113 ministrators et al.*, 7 Ohio, pt. 1, 21, the late supreme court in bank, having before it the direct question whether an equitable mortgage or a subsequent judgment lien should have the preference, held, that inasmuch as a mortgage created a specific lien, and the judgment lien could entitle the judgment creditor to no other than the rights of the debtor, or place him in any better condition than to take the place of the debtor himself, the equitable mortgage was entitled to the preference. In the case of *Lake v. Doud et al.*, 10 Ohio, 415, the instrument before the court, like the instrument now presented, was a mortgage, defective as a conveyance of the legal title, from having the attestation of only one witness, but in all other respects properly executed; and the court held that, although not a legal mortgage, it was an equitable mortgage, and could be enforced in a court of equity against a subsequent judgment levied on the premises, upon the principle settled in the case of the *Bank of Muskingum v. Carpenter et al.* Had the court adhered to this decision, it would have saved much perplexing litigation and preserved the harmony of our system of law on this subject.

In the case of *Magee v. Beatty*, 8 Ohio 396, in which the question of the priority of a mortgage over the claim of a judgment creditor was involved, the determination of the cause turned mainly upon the question whether the mortgage became operative within the meaning of the seventh section of the registry act of 1831, from the time of its delivery for record, or from the time of its being actu-

ally copied into the record, and upon this question the court divided in opinion until the passage of the declaratory act of 1838.

In the case of *Stansell v. Roberts et al.*, 13 Ohio, 148, the court determined that, under the registry act of 1831, a second mortgage, 114] first recorded, was to be preferred to a *prior unrecorded mortgage, although the second was taken with notice of the first.

In the case of *Mayham v. Coombs et al.*, 14 Ohio, 428, the court, upon the authority of *Magee v. Beatty*, and of *Stansell v. Roberts*, go a step further, and for the first time give the general lien of a subsequent judgment a preference over a prior unrecorded mortgage. The case of *Jackson and Buel v. Luce et al.*, 14 Ohio, 514, is to the same effect. And in the case of *Holliday v. Franklin Bank of Columbus et al.*, 16 Ohio, 533, the court determined that a mortgage, previous to its delivery to the county recorder for record, had no effect either at law or in equity, against a subsequent judgment, by force of the provisions of the registry act of 1831, as amended in 1838.

The last four decisions referred to are based on the interpretation given to the statute, which provides that mortgages shall take effect and have precedence from the time of the delivery for record. It was urged that the registry law had reference only to instruments affecting the legal title to land, and left equitable mortgages undisturbed. But the court, on full consideration, in giving a construction to the law, has seen proper to declare that a mortgage shall have no effect, either in law or in equity, before due execution and delivery for record. In the last case referred to, the court draws a distinction between mortgages and other contracts affecting the interest in lands, and repels the old doctrine that a mortgagee is to be treated as a purchaser. In the language of the court in that case, "Mortgages are bare securities to protect either equitable or legal rights. They are neither the legal right nor the equity, but an incident which attaches to some substantial right or equity. The right or interest to which a mortgage may attach is absolute; a mortgage is secondary and dependent. Destroy the debt or right to which the mortgage is attached, and it dies; and without some right to which it can attach, it could never exist. It is, in its nature, an incident. The incident may sometimes constitute the en- 115] tire value of the *substance; but it does not follow, therefore, that the same principles should govern both. In fact we know they do not. But it was the tendency of the courts to regard them

as governed by the same principles that induced the legislature to interfere."

If the question involved here had not been determined by adjudication in this state, and affirmed and adhered to for a number of years, a majority of this court would feel constrained to take a different view of it. But the decision made is based on a construction given to a statute, has relation to rights of property, and, indeed, has become a rule of property in determining priorities among creditors. Stability and certainty in the law are of the very first importance. Hardships may sometimes result from a stern adherence to general rules. This is unavoidable under any system of jurisprudence. Some barrier is essential to guard against uncertainty. If judicial decisions are subject to frequent change, it would disturb and unsettle the great landmarks of property. The certainty of a rule is often more important than the reason of it; and in the case now before us, we think that the maxim *stare decisis et non quieta movere* is the safe and judicial policy, and should be adhered to. If the law, as heretofore pronounced by the court in giving a construction to the statute, ought not to stand, it is in the power of the legislature to amend it without impairing rights acquired under it.

The complainant further insists that, although the attestation is signed by but one witness; yet, inasmuch as the justice of the peace, who was competent to be one of the attesting witnesses, subscribed his certificate of the acknowledgment on the same sheet, that there was a substantial attestation of the instrument in compliance with the statute.

The requirements of the statute are that "the signing and sealing shall be acknowledged by the grantor in the presence of two witnesses, who shall attest such signing and sealing, and subscribe their names to such attestation," and in addition, "such signing and sealing shall be acknowledged *by the grantor, before a [116 competent officer, who shall certify such acknowledgment on the same sheet, and subscribe his name to such certificate." The official signature of the magistrate to his certificate will not answer a double purpose and supply the deficiency which here existed.

Relief is asked for in this case also upon the ground of mistake in the execution of the instrument, without overruling the decisions heretofore referred to. A party, to entitle himself to relief in chancery, on the ground of mistake, must make the necessary allega-

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tions in his bill, to bring himself within the rule of equity jurisdiction under this head. Without, therefore, going into the question whether relief could be granted on the ground of mistake, without coming in conflict with the judicial decisions which have been noticed, it is sufficient to say that the complainant has failed to make the necessary allegations, either in the original bill or in the bill of review, to entitle him to relief on this ground.

Bill dismissed.

BENJAMIN BROWN v. WILLIAM H. KIRKMAN ET AL.

Under the act of March 16, 1838, Swan's Statutes, 268, a mortgage lien is perfected by delivering the mortgage for record to the recorder of the proper county.

Such lien is not defeated, as to a subsequent incumbrancer with notice in fact, by a mistake of the recorder in making the record.

THIS is a bill in chancery reserved in the district court in Monroe county.

William H. Kirkman purchased of Silas Severance the east half of the southwest quarter of section 28, township 6, range 8, in the Zanesville land district, in Monroe county, Ohio, and, to secure the purchase money, on the 29th December, 1845, executed and delivered to Severance a mortgage *upon said premises, which was entered for record with the recorder of Monroe county, and recorded February 13, 1846.

In making the record, the recorder described the premises as the *southeast* instead of the *southwest* quarter of the section.

The complainant, having become the assignee of the mortgage, filed his bill for foreclosure.

On the 16th May, 1846, Kirkman executed and delivered to the defendant, Asbury Gardner, another mortgage upon the same premises to secure the payment of \$343, which was entered for record and recorded May 30, 1846, and which is now set up by Gardner as a prior lien upon the premises.

Prior to the date of his own mortgage, Gardner had notice in fact of the mortgage to Severance.

Hollister, for complainant.

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Stansel v. Roberts, 13 Ohio, 148 ; Mayhew v. Parker, 14 Id. 431 ; Holliday v. Franklin Bank, 16 Id. 533 ; Beverly v. Ellis, 1 Rand. 102 ; 14 Vt. 14 ; 10 Ala. 368.

D. Peck & I. E. Eaton, for Gardner.

CORWIN, J. It is satisfactorily shown in the case that, prior to the date of the mortgage to Gardner, he had notice that Kirkman had given the mortgage upon the premises to Severance to secure the purchase money for the same ; but it is claimed that if the record of a mortgage be materially defective, or misdescribe the mortgaged premises, it is inoperative as to all subsequent purchasers or incumbrances.

By the act of March 16, 1838, Swan's Stat. 268, it is declared "that mortgage deeds do and shall take effect and have preference from the time the same are delivered to the recorder of the proper county to be by him entered on record," etc. ; and there can be no doubt that, under this statute, when the mortgage to Severance, being in all other respects regular and valid, was delivered to the recorder for record, its execution was completed, and it created a valid lien upon the premises.

*It is the object and purpose of a record to furnish notice [118 to the world of the existence of titles and incumbrances, and when the record is made it is constructive notice to everybody of what it contains, although no actual notice be had ; and it is true that a record will only be considered as furnishing constructive notice when its examination will furnish *actual* notice. But although it can not be said that Gardner was bound to take notice of the mortgage to Severance from the record, or that the record was sufficient to put him upon inquiry, yet the lien had been perfected by the entry of the mortgage for record, and Gardner had notice of its existence *independently* of the record. And when the execution of a mortgage has been in all respects perfected, and a lien has been created under the provisions of the act before recited, a subsequent incumbrancer, having notice, in fact, of its existence, can not claim that such lien has been defeated, because the record did not furnish him the notice which he already had. /

And this conclusion in no manner conflicts with either of the cases in the 13th, 14th, and 16th Ohio Reports, but is in entire consonance with the rules there recognized.

Decree for complainant.

LESSEE OF DAVID J. BEARDSLEY v. ERASTUS CHAPMAN.

The words "by a deed duly authenticated and recorded," in the occupying claimant law, mean a deed to the person under whom the occupant claims, and not a deed to the occupant himself. The contrary construction in *Glick v. Gregg*, 19 Ohio, 57, is overruled.

A tenant for life, obtaining his title and possession with knowledge of the quantity of his estate, is not entitled to the benefit of said statute against the reversioner or remainderman.

And the provision in the act requiring a deed duly authenticated and recorded to the occupant's grantor, must mean a deed apparently conveying an estate which, when transmitted to the occupant, will justify him in making lasting and valuable improvements, and demanding payment for them before yielding possession.

The statute is intended for the relief of those who act in good faith. It was not designed to enable a man, by an act of bad faith, to make another his debtor.

[119] *The general rule is that a person is not chargeable with notice of an adversary title in the absence of proof, but that he is bound to know the defects apparent upon his own title papers, and is required to take notice of the recitals in the chain of deeds, or other muniments under which he claims.

Without deciding how far this doctrine is applicable to a person seeking the benefit of the occupying claimant law, there is no difficulty in holding that he is not to be presumed to know any defects or recitals that do not appear upon the muniments which are necessary to establish his claim under that act. Thus, in a case like the present, he will not be presumed to know recitals in deeds prior to the deed to his grantor.

If a recital in that or his own deed expressly shows an adverse claim to the lands, the occupant will be held to have notice of such claim. But if it only shows that the premises once belonged to a third person, such recital will not defeat the occupant's claim to the benefit of this act.

This court may review on certiorari the decision of an inferior court on a motion to set aside the verdict of a jury under said statute, though the motion was based on matter of fact—the testimony being set out in the bill of exceptions.

When the jury find a balance in favor of the occupant, he is entitled to a judgment for costs, but not for said balance.

THIS is a writ of certiorari to the common pleas of Trumbull, reserved in the district court in that county.

The action below was ejectment. The facts appear by bills of exception taken during the progress of the cause.

In 1814 the lands of William Chapman, deceased, were divided on a proceeding for partition in the common pleas of Trumbull, and twenty acres, the tract described in the demise, were aparted in severalty to his daughter Mary, then intermarried with Elijah Spelman. Shortly after this partition Mary Spelman died, leaving issue of the marriage and her husband surviving her.

In June, 1823, Elijah Spelman, seized as tenant by the curtesy, conveyed the tract above mentioned to David Chapman, the brother of his deceased wife, by a quitclaim deed.

On the 29th of April, 1824, David Chapman conveyed the land to Erastus Chapman, the now defendant, by deed with covenants of general warranty. The first of these deeds, after the description of the land by the abutments, contains this clause: "being the same piece of land which was distributed from the estate [120 of William Chapman, sen., late of Vernon, deceased, to Mary Spelman."

There was no evidence that either of the Chapmans had notice that Spelman only had a life estate, and David Chapman testified that when he received his deed from Spelman, and when he conveyed to defendant, he supposed that the estate was a fee simple.

Elijah Spelman died in 1846, and the plaintiff's lessor, as grantee of the heirs of Mary Spelman, brought his ejectment against Erastus Chapman. After verdict against him, the defendant claimed the benefit of the act for the relief of occupying claimants, which was allowed by the court, and a bill of exceptions taken by the plaintiff.

After the return of the assessments by the jury of valuable and lasting improvements, the plaintiff's lessor applied to the court to set aside the assessment and order a new valuation. This was refused by the court, and a bill of exceptions setting out the testimony given in support of this application was taken.

The jury having returned the sum of \$120, in favor of the defendant, being the excess of the valuable and lasting improvements over the annual profits and damages from waste, the court rendered judgment in favor of defendant and against the plaintiff's lessor for that sum, and also for the costs of the proceeding under the occupying claimant law.

It is now assigned for error:

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First. That the court erred in deciding that the defendant was entitled to relief under the law for the relief of occupying claimants.

Second. In refusing to set aside the assessment of the jury under the occupying claimant law.

Third. In rendering judgment against the plaintiff's lessor, and ordering execution for the amount reported by the jury.

M. Birchard, for plaintiff in certiorari.

Leiby v. Wolff, 10 Ohio, 183; *Reeder v. Barr*, 4 Id. 458; *Scott v. Douglass*, 7 Id. 362; *Scroggs v. Taylor*, 1 A. K. Marsh. 247; *Harlem v. Bell*, 4 Bibb, 106; *Clay v. *Miller*, 4 Id. 461; 4 Id. 206; 1 A. K. Marsh. 445; 1 J. J. Marsh. 404; 2 Litt. 208; 5 Id. 82; 4 Mon. 59; 7 Id. 537.

Sutliff & Tuttle, for defendant.

Glick v. Gregg, 19 Ohio, 57; 2 Id. 235; 1 Id. 156; 11 Id. 36.

THURMAN, J. The first question is, Did the common pleas err in deciding that the defendant Chapman was entitled to the benefit of the occupying claimant law? On the part of the plaintiff, it is contended that the defendant was bound to take notice of the defects in his own title, and that the deed from Spelman to David Chapman contained sufficient to show that Spelman had but a life estate, or, at least, to put the defendant upon inquiry as to the quantity of his estate. For the defendant, it is argued that the deed from David Chapman to the defendant being, on its face, a deed in fee duly authenticated, and the same having been recorded, that deed alone is sufficient to bring him within the statute, and that it was so decided in *Glick v. Gregg*, 19 Ohio, 57. But, whether this is so or not, the defendant denies that the deed from Spelman shows the quantity of his estate, or contains anything that ought to be held to put a purchaser on inquiry in relation to it.

It is true that in *Glick v. Gregg*, the words in the statute, "by deed duly authenticated and recorded," seem to have been construed as referring to a deed to the occupying claimant himself, and not to a deed to the person under whom he claims; but possibly that case might have been well decided, as it was, without the above ruling. At all events, a majority of this court are clearly of opinion that the above construction is wrong.

The act, Swan's Stat. 605, provides for several classes of cases.

The first class is where the occupant, being in quiet possession, "can show a plain and connected title, in law or equity, derived

from the records of some public office." *This embraces pat- [122
ents, governors' deeds, certificates of entry of the public lands,
Virginia military surveys, and the like.

The second class is where the occupant, being in quiet possession, holds "by deed, devise, descent, contract, bond, or agreement, from and under any person claiming title, as aforesaid, derived from the records of some public office, or by deed duly authenticated and recorded."

This clause covers, first: All cases where the occupants derive their title by "deed, devise, descent, contract, bond, or agreement" from and under a person of the first class. Second: All cases where the occupant derives title from a person claiming under a "deed duly authenticated and recorded."

These words, a "deed duly authenticated and recorded," do not refer to a deed to the occupant, but to the person under whom the occupant derives title.

The third class is where the occupant is in quiet possession, holding "under sale on execution, against any person claiming title as aforesaid, derived from the records of some public office, or by deed duly authenticated and recorded."

The fourth class is where a person is "in possession of, and holding any land under any sale for taxes, authorized by the laws of this state, or the laws of the territory northwest of the river Ohio."

The fifth and last class embraces persons "in quiet possession of any land, claiming title thereto, and holding the same under a sale and conveyance made by executors, administrators, or guardians, or by any other person or persons, in pursuance of any order of court, or decree in chancery, where lands are, or have been directed to be sold."

And in reference to all these classes, the act requires that the purchaser or purchasers of the premises shall "have obtained title to, and possession of the same, without any fraud or collusion on his, her, or their part."

Now, the construction in *Glick v. Gregg*, renders a part of the statute wholly unnecessary, and is irreconcilable with *other [123 parts of it. Thus, where was the use of providing that a deed made under an order or decree of court, for the sale of land, should entitle the grantee to the benefit of the act, if, as is ruled in that case, a previous clause of the section makes *any deed* sufficient for that purpose. Again, the first branch of the second clause of the section

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provides for a case where the occupant holds by deed, but it requires the deed to be from a person who can show a plain and connected title, in law or equity, from the records of some public office. Why this limitation, if the remaining branch of the clause makes a deed from *any person* sufficient? The third clause gives the relief to an occupant holding under sale on execution, against any person claiming title, as aforesaid, derived from the records of some public office, or by deed duly authenticated and recorded. Why require the judgment debtor to be a person deriving title as aforesaid, if a sheriff's deed, under a sale on execution, against *any person*, is enough?

The fourth clause protects the tax purchasers. Where was the necessity for this, if *any deed* protects the occupant?

It is admitted in *Glick v. Gregg*, that the construction we give the statute is the more obvious one, and it is manifestly the only one that makes the different parts of the section consistent and sensible. It is the construction that always prevailed before *Glick v. Gregg*, and a majority of the court are satisfied that is the true one. We hold, therefore, that the deed to the defendant was not, of itself, sufficient to entitle him to relief. He required both that deed and the deed to his grantor, to bring him within the statute. These two deeds are to be considered. They are deeds from Elijah Spelman to David Chapman, and from David Chapman to the defendant. As to the latter, it purports to convey a fee simple; and nothing in it indicates that the grantor was not seized of such an estate. The conveyance from Spelman is also a deed in fee. True, it describes the premises, after giving the abutments, as "the same piece of land which was distributed from the estate of William [24] Chapman, late of Vernon, *deceased, to Mary Spelman," but these are words descriptive of the land, and not of the estate. Were this a conveyance of a life estate only, the defendant would not be within the act. For, if a conveyance of a life estate to the occupant will not entitle him to the benefit of the law, as against the reversioner, or remainderman, for the same reason the conveyance of such an estate to his grantor will be insufficient. In other words, as the statute requires a deed, duly authenticated and recorded, to the grantor, it must mean a deed apparently conveying an estate which, when transmitted to the occupant, will justify him in making lasting and valuable improvements, and demanding payment for them before yielding possession. Now, it will hardly

be contended that a tenant for life, knowing the quantity of his estate, may make improvements to any extent and require payment for them of the reversioner or remainderman. The authorities cited by plaintiff's counsel are conclusive that he can not. The statute is for the relief of those who act in good faith. It was not designed to enable a man, by an act of bad faith, to make another his debtor.

But, though Spelman's deed is a deed in fee, it is urged by counsel that the foregoing recital in it was sufficient to put the defendant on inquiry; and that, had he made inquiry, he would have discovered that the fee was in the heirs of Mary Spelman. This argument is pressed because there is no proof of actual notice to the defendant. He is sought to be charged with notice by the terms of Spelman's deed, and by them alone. The general rule is, that a person is not chargeable with notice of an adversary title in the absence of proof; but that he is bound to know the defects apparent upon his own title papers, and is required to take notice of the recitals in the chain of deeds or other muniments under which he claims. Without deciding how far this doctrine is applicable to a person seeking the benefit of the occupying claimant law, we have no difficulty in saying that he is not to be presumed to know any defects or recitals, that do not appear upon the muniments, which are *necessary to establish his claim under that act. Thus, [125 in a case like the present, he will not be presumed to know recitals in deeds prior to the deed to his grantor. It is upon this deed, and the conveyance of his grantor to him, that his claim to the benefit of the statute rests; and an application of the general rule would only charge him with notice of what appears on these instruments. In the next place, we are of opinion that the recital in question does not defeat the defendant's claim. To hold that it does, would withdraw a multitude of cases from the operation of the statute which have always been considered as embraced by it. Nothing is more common than to recite in a deed to whom the land was patented. Does this raise a presumption that the title is yet outstanding in the patentee? And can no occupant claiming under such a deed have payment for his improvements? We can not so hold. If the deed in question expressly showed an adverse claim to the land, we might hold the defendant to be charged with notice of such claim. But there is nothing of this kind appearing upon it. Taking the recital in the strongest sense for which counsel con-

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tends, and it amounts to nothing more than that Mary Spelman once owned the land. It differs then, in no respect, from the ordinary case above mentioned of a patent being recited.

We think the common pleas did not err in giving the defendant the benefit of the statute.

The next question is, Did the court err in refusing to set aside the verdict of the jury?

The ground of this motion was, that the jury erred in their assessments. It is not pretended that they adopted any rule contrary to the statute, but it is contended that they erred in their judgment. The question then is one of fact. A motion to set aside a verdict like this, is in effect a motion for a new trial. At common law, the decision of a motion for a new trial, when the motion is on the ground that the verdict is against the weight of the evidence, can not be reviewed on error. By our statute it can be; and although this statute does not, in terms, include a case like the present, we 126] *suppose that, equitably construed, it will include it. We have, therefore, considered the testimony given upon the motion; but we find in it no sufficient reason for setting aside the verdict.

The only remaining question is, Did the court err in rendering judgment against the lessor of the plaintiff for the balance found against him by the jury?

There can be no doubt on this point. The judgment is clearly erroneous. The proceeding is wholly statutory, and no statute authorizes such a judgment. The judgment for costs was proper enough, but that is as far as the court could go. As to the balance found by the jury, the plaintiff must pay it before he can have a writ of possession. This is all the statute provides on the subject. The judgment, then, so far as this balance is concerned, must be reversed, and the other decisions of the common pleas are affirmed.

PHILO SCOVILL V. THE CITY OF CLEVELAND ET AL.

Under the charter of the city of Cleveland (which was divided into three wards), a council was elected on the 4th of March, 1850, to serve for one year, consisting of three aldermen elected at large, and three councilmen in each ward, who were required to "reside therein." On the 22d of that month the legislature amended the charter, dividing the city into four wards, and

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reducing the number of councilmen to two in each ward. By this division, some of the councilmen were thrown out of the wards for which they were elected. This amendment made no provision for an election under it until the next year, nor did it provide when it should take effect.

The amendatory law had no effect upon the council then elected. The effect of its provisions, dividing the city into wards for election purposes, must be postponed until they could be called into requisition in future elections.

If this were otherwise, yet, while the members of the council continued to act *de facto*, their proceedings would be valid.

Under the ninth section of the city charter, providing for the improvement of streets, etc., by a discriminating tax to be levied upon ground bounding on such streets, the committee of estimate and assessment need not be appointed before adopting the ordinance for its construction.

A want of legal notice to claimants of damages arising from the construction of such improvement, can not be set up by one not having any such claim.

*Such assessment, under said section, need not be levied upon all the lands [127 on such street, but only upon those bounding upon the improvement or "near thereto."

It is no objection to such assessment that it exceeded the actual expense of the work, provided it was in accordance with the estimate, made in good faith.

Such discriminating assessment for that purpose, laid upon grounds immediately benefited in proportion to such benefit, was a legitimate exercise of the taxing power under the constitution of 1802; nor is the same opposed to section four, article eight, of that instrument, providing for the inviolability of private contracts.

THIS is a bill in chancery reserved in Cuyahoga.

The complainant was the owner of real estate situate on Superior street, in the city of Cleveland, which was charged with a special tax assessed under an ordinance for the improvement of said street. The bill prayed an injunction against the collection of the tax, which was allowed by the superior court of Cleveland. The facts necessary to an understanding of the points decided appear in the opinion of the court.

Bishop, Backus & Noble, for complainant. *Ohio ex. rel. Ives v. Choate*, 11 Ohio, 511; *Thatcher v. Powell*, 6 Wheat. 119; *Sharp v. Spear*, 4 Hill, 76; *Id.* 92; 1 Mass. 86; 2 Mass. 489; 3 Pick. 447; 4 Mass. 493; 17 Ohio, 340; *Jonas v. Cincinnati*, 18 Ohio, 323; *Reed v. City of Toledo*, *Id.* 166; *Collins v. Hatch*, *Id.* 523; 13 Mass. 274; 5 Mass. 547; 16 Mass. 144; *The People v. Mayor of Brooklyn*, 6 Barb. 209; *Sutton's Heirs v. City of Louisville*, 5 Dana, 28; *Jacob*

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v. City of Louisville, 9 Dana, 114; *City of Lexington v. McQuillan's Heirs*, 9 Dana, 513.

Willey & Carey, for defendants. *State v. Constable*, 7 Ohio, 245; *State v. Alling*, 12 Ohio, 16; *State ex rel. etc. v. Jacobs*, 17 Ohio, 143; *Cincinnati v. Gwynne*, 10 Ohio, 192; *Culbertson v. Cincinnati*, 16 Ohio, 574; *Bonsall v. Lebanon*, 19 Ohio, 518.

Horace Foote, for defendants. *Dartmouth College v. Woodward*, 4 Wheat. 578; 2 Kent's Com. 274; *Trustees etc. v. Hills*, 6 Cow. 128] 23; *All Saints *Church v. Lovett*, 1 Hall 191; *Charitable Association v. Baldwin*, 1 Met. 359; *Green v. Cady*, 9 Wend. 444; *Williams v. School District, etc.* 21 Pick. 75; and *People, etc. v. Mayor of Brooklyn*, 4 Comst. 420.

John C. Grannis was also of counsel for defendants.

RANNEY, J. The complainant in this case places his right to a perpetual injunction against the collection of the assessment upon three distinct grounds: First. That the ordinance under which it was assessed was not passed by a number of *legal* councilmen equal to the majority of a legal council. Second. That the proceedings of the council, in making the assessment, were unauthorized by the charter of the city and amendments thereto, and were consequently illegal. Third. That the whole proceeding was in contravention of sec. 4, art. 8, of the constitution of 1802. We will examine each of these propositions, and the reasons assigned for each, in the order in which they are stated.

First. Was this ordinance passed by a majority of a *legal* council? Prior to the amendment of the city charter in March, 1850, the city was divided into three wards, in each of which was to be elected, on the first Monday of March in each year, three councilmen "actually residing therein," and as many aldermen as wards, to be chosen from the city at large, no two of whom could reside in any one ward. These twelve persons, with the mayor as presiding officer, constituted the city council, to whom the government of the city was committed. A majority of this council must concur to pass an ordinance; and by an amendment passed in 1841, the concurrence of eight at least was made necessary to levy the general taxes for city purposes. Whether that provision extended to an assessment of this character it is not now necessary to decide. The ordinance in question was passed on the 26th of March, 1850, and was voted for in all its stages by ten of the twelve members

elected on the 4th day of that month. But it is claimed that three of these members were ousted from their offices, having been thrown *out of the wards for which they were elected by the amend- [129 ment of the city charter passed in March, 1850. Some controversy exists as to the time this act took effect; but we see no reason to doubt that it took effect at the date affixed to it, which was March 22. If it were otherwise, however, it would not alter our conclusions.

By the first two sections of this act, certain territory was annexed to the city, and the whole was divided into four wards by specific boundaries. The third section reads as follows :

"The number of councilmen for each ward *hereafter to be elected* at the annual charter election, shall be reduced to two, and the annual charter election of said city shall, *after the present year*, be held on the first Monday of April."

No provision whatever was made for holding any elections in the whole or any part of the city in the year 1850. On the contrary, by the positive terms of the act, the first election under the new division was to be held *after* that year. Now as the principal, if not the only object in dividing the city into wards was for election purposes, we feel no hesitation in postponing all such provisions of the law to the time when they could be called into requisition for that purpose. We think this the obvious intention of the act, and we are sure this construction gives legitimate effect to every provision in it. This leaves the council elected March 4th, 1850, the legally constituted council of the city for that year; nor do we suppose that this alteration of the wards had any more effect upon them than an alteration of the legislative districts of the state, before the expiration of the terms of the sitting members, with a view to a future election, would have upon the latter. The object would be the same in both cases. This view of the matter disposes of the question; but if it were otherwise, we are still equally clear that, while they continue to act *de facto* in virtue of their election, their proceedings would be valid and binding. This principal has been expressly and repeatedly settled by the *supreme court of [130 this state, *State v. Constable*, 7 Ohio, 245; *State v. Alling*, 12 Ohio, 16; *State, ex. rel. v. Jacobs*, 17 Ohio, 143.

Second. Were the proceedings of the council in conformity to the charter and amendments? To a clear understanding of the matters arising under this question, it is necessary to recur to the

ninth section of the city charter, passed March, 1836. It reads thus: "The city council shall have power to levy a special tax, to defray the expense of grading, paving, or otherwise improving any road, street, alley, lane, etc., *by a discriminating assessment upon the land and ground bounding and abutting upon such road, etc., or near thereto, in proportion to the benefit accruing therefrom to such ground or land*; and the city council shall appoint a committee of three disinterested judicious freeholders of said city, to estimate the cost of any such projected improvement, and to assess the expense on the land and ground aforesaid; and it shall be the duty of the city council to provide by ordinance for the correction and equalization of said assessment; and the city council shall give notice in one or more newspapers published in said city, for six consecutive weeks, of the improvement to be made, in order that any one damaged by reason of such improvement may file his claim in writing in the office of the city clerk, within ten days after the expiration of said six weeks' notice; and the said committee shall assess damages, if any, to such claimants, and shall add the same to the costs of the improvement, as a part of the expense thereof, to be assessed as aforesaid; and said committee, within twenty days after the time shall have expired for filing claims for damages (unless for good cause the council shall grant them further time), shall make return to the office of the city clerk, setting forth the ultimate cost of such improvement, including the damages awarded by them to the claimants, together with the names of such claimants and the ground of claim, with the amount awarded them severally set opposite their respective names, and also a brief description of the lands and grounds upon which they shall have assessed the expense of the [131] improvement, etc.; and the city council *if they order and direct the improvement to be made, shall direct the city clerk, whose duty it shall be to deliver therewith, etc., to the city collector, to be by him collected, etc."

By subsequent laws, special taxes were to be certified to the auditor of the county, and collected as other taxes.

The first exception taken to the action of the council is that they should have appointed the committee of estimate and assessment, and have received their report before passing the ordinance for constructing the improvement; when in fact they were appointed at the same time and by one section of the ordinance itself. It is not contended that this is so expressly provided by the charter, but

from the nature of their duties, it is claimed that this report was designed for the information of the council before providing for the work. The section is not free from ambiguity upon this point; but proceeding upon the same ground assumed by counsel for complainant, we are brought to the opposite conclusion. The improvement must first be "projected." By whom and how projected? Evidently by the council, and we know of no more appropriate method for expressing their corporate assent than by ordinance. By the positive terms of the section, *after* this the committee must be appointed. Their first duty is to estimate the cost of the improvement and the amount to be paid claimants; and *then* to assess the whole upon the lands benefited. The ascertainment of the cost of damages is the indispensable *predicate* upon which the assessment of the tax is founded, and must of necessity precede it. The whole is then returned to the council, and is again under their entire control. By the report of the committee, they are put into the possession of information approximating to reasonable certainty, as to the cost of the improvement. If they are unwilling to encounter it, they need go no further: if otherwise, they can then "order and direct" the proper officer to cause the improvement to be made; and after the assessment is corrected and equalized, cause the same to be returned to the auditor and placed upon the duplicate. This clause was substantially, nay, strictly pursued.

*It is next objected that no sufficient notice "of the improvement to be made" was given to claimants of damages, in pursuance of said ninth section. The notice actually given was the publication of the ordinance, with the word "notice" prefixed. It is nowhere alleged or pretended that the complainant had any claims for damages, or that he was in any way injured for the want of a proper notice. It is difficult to see how *he* can make this objection enure to his benefit, or how it can add anything to the *equity* of his bill. It will be in time to decide this question when those who have been injured complain.

Again, it is claimed that the assessment should have been upon all the land bounding on the whole street, whereas it appears that it was put only upon those abutting upon the part of the street improved, and "near thereto." We do not understand council as contending that a part of a street might not in this manner be improved without undertaking the whole, but they insist that the assessment must be upon the *whole*. We think this construction en-

tirely inadmissible. The tax is upon land alone, and is imposed upon the principle of charging each particular tract with its just proportion, according to the benefit *especially* accruing to it from the improvement. The owner is not taxed because of its general convenience, but because his land is *especially* enhanced in value. Now this street may be a mile or more in length, and the lands upon it at the upper end, instead of being enhanced in value, may be actually depreciated by the increased facilities for business on the part improved. It would be little less than absurd to hold that the legislature *intended* to compel these lands to be taxed, while those within two hundred feet of the improvement, upon streets intersecting it, were not to be, because lying on streets called by other names; although it is manifest the owners of the latter would derive fourfold advantage from it over the former. We can not therefore say that the committee in the exercise of their discretion did not assess all the lands on the street benefited by the improvement; 133] and as it is not pretended *but that they acted in good faith, no foundation is laid for controlling that discretion by this court. But we think the charter has controlled their discretion, in a manner entirely consistent, however, with their action, by *requiring* them to make the assessment upon lands abutting the improvement "or near thereto." If the council have power under the general words "any street," etc., in the first clause of the section to improve a part of a street, as appears to be conceded, it seems to us clear that the words in the next clause, "grounds bounding and abutting on *such* street," confine the assessment to ground on the part of the street improved. If part only can be lawfully improved, that part only can be lawfully taxed; and this we are satisfied is the true meaning of the law.

It is next insisted that the assessment was far too much, being for \$10,662, when in fact the improvement was made under a contract entered into April 20th, 1850, for \$10,000. It is not made to appear with sufficient clearness to base judicial action upon, that this sum covered the whole cost of the improvement; but if it did we should still be of opinion that the fact alone that the assessment exceeded the actual expenditure, unattended by any circumstance of fraud or bad faith in the committee, would not invalidate the tax. The committee was appointed March 26th, 1850, and for aught that appears entered upon the discharge of their duties. As before stated, the first step to be taken by them was to *estimate* the cost,

etc., of the improvement; the next to assess the property. Now, all this might have been done before the council had made any contract for its construction, or had even determined in what manner the work should be done. At all events, no necessary connection, by law, exists between their duties and the actual construction of the work. All that is required of them is to "estimate" in good faith the probable cost of the work, and upon this basis the tax is levied. This estimate in its very nature may, and almost unavoidably will, vary from the actual expense incurred. Nor does this view of the case in the least impair the authority of the [134 cases of *Jonas v. Cincinnati*, 18 Ohio, 318, and *Reed v. Toledo*, Id. 161, relied upon by complainant's counsel. In each of those cases a part of the assessment was made, as appeared by the ordinance, for purposes not authorized by the charter, and this was very correctly held to render the tax illegal.

Some other considerations of minor importance are suggested by counsel; but without entering into an extended examination of them, it will suffice to say, that we are all of opinion that they furnish no ground for the relief prayed for, and we are entirely satisfied that the requirements of the charter have been duly observed in making the assessment.

Third. The next question arising is, Was the charter itself consistent with the first constitution of this state, under which these proceedings were had? To show that it was not, two sections of that instrument are invoked. They are as follows:

Art. 8, sec. 4. "Private property ought and shall ever be held inviolate, but always subservient to the public welfare; provided a compensation in money be made to the owner."

Art. 8, sec. 28. "To guard against the transgression of the high powers which we have delegated, we declare that all powers not hereby delegated remain with the people."

Each of these sections contains very important provisions which it is the right of every citizen to invoke, and the duty of the judicial tribunals to guard with scrupulous fidelity. The section last quoted guards against the exercise of powers not delegated by any department of the government. The powers delegated to separate departments are legislative, executive and judicial, without any attempt at specific enumeration. Each of these departments can exercise such power, and such only, as falls within the scope of the express delegation. Hence, we have already decided in the case

of the Cincinnati, Wilmington and Zanesville R. R. Co. v. The Commissioners of Clinton County, ante 79, that any act passed by the **135]** general assembly "not falling fairly within the scope *of legislative power is as clearly void as though expressly prohibited." Does this section fall within that limit? It provides for making and improving the streets of a city—an undertaking of a strictly and emphatically public character. This state, in common with all the other states, has always exercised this power, and has authorized the counties, towns and cities to do the same within their respective limits; and it is now too late to question it as one of the undoubted powers of the legislative department. As indispensable *means* to attain this end, the right to take private property and to levy and collect taxes, must exist. Roads can not be built without land to locate them upon and money to pay for their construction. But neither of these rights can be exercised without the existence of a rightful, constitutional end to be accomplished, to which they may be referred. Without this, property can not be taken or taxes levied. And this brings us to the question, under which one of these two rights of the public does the assessment in question fall, and to consider what limitations and restrictions were fixed upon the exercise of each by that constitution, when employed for legitimate ends. The right of *eminent domain* and the right of *taxation*, both alike involve the right to take private property, and in both compensation is made or is supposed to be made. In the first case it *must* be made in money by the positive requirements of the section first recited, and if this assessment falls under that division it can not be sustained. In the case of taxation, the taxpayer "is supposed to receive his just compensation in the protection which government affords to his life, liberty and property, and in the increase of the value of his possessions by the use to which the government applies the money raised by the tax." *The People v. Mayor, etc., of Brooklyn*, 4 Comst. 422.

But here the analogy ends, and in pointing out the distinction between the two, I can not do better than to adopt the language of Mr. Justice Ruggles, in the case just referred to.

136] *"Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden."

"Private property taken for public use by right of eminent do-

main is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share.

"Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes creates no obligation to repay, otherwise than in the proper application of the tax.

"Taxation operates upon a community, or upon a class of persons in a community, and by some rule of apportionment.

"The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals."

If these distinctions are sound, and we believe them to be, it is not difficult to see that the section of the constitution referred to has no application to this case. The assessment upon the complainant belongs to the taxing power, and in the constitution then in force was subject to no express restriction, but that against poll taxes. It is not pretended that any land or other property was taken or attempted to be taken from the complainant for the construction of this improvement; but he was taxed, in common with a class of persons standing in the same situation, his share of contribution in proportion to the benefit received, for a public burden. We have already seen that the city might be constitutionally authorized by the legislature to construct improvements of this character, and that it might resort to taxation to do it. Is there any constitutional objection to its being a special or discriminating tax upon the real estate more particularly benefited by the improvement? If there is any, it is not found in express terms in the instrument. This may be matter of regret. It is because experience has shown that the unlimited right to tax, even for lawful *purposes is often abused, that most important restric- [137] tions are put upon it in the constitution of this state now in force. But it is impossible for this court to fix limits to the power, where the constitution has fixed none. Without this, as expressed by Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514:

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the government, as part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is

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granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens; and that portion must be determined by the legislature. This vital power may be abused, but the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation." And again, in *McCulloch v. Maryland*, 4 Wheat. 428, the following observations are found coming from the same high authority:

"It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the government acts upon its constituents; this is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government can not be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislature [38] and the influence of the *constituents over the representatives to guard them against its abuse."

This unlimited power to tax necessarily involves the right to designate the property upon which it is to be levied—in other words, to apportion the tax. And except in cases where the proceeding is merely colorable, and it is really and substantially an exercise of the right of eminent domain, the judicial tribunals can not interfere with the legislative discretion, however erroneous it may be. This was expressly so decided in the case before cited from 4 Comstock, and has in effect been so held in this state in the cases of *Cincinnati v. Gwynne*, 10 Ohio, 192, and *Bonsall and wife v. Lebanon*, 19 Ohio, 418.

When the argument of the complainant's counsel was prepared, much reliance was placed upon the case of *The People v. Mayor*, etc., of Brooklyn, 6 Barb. 209, in the supreme court of New York. It is unnecessary to notice this case further than to say that it is the same case referred to in 4 Comstock, where the decision of the

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supreme court was reversed, and the conclusions of this case fully sustained by the court of appeals.

We have also been referred to the cases of *Sutton's Heirs v. The City of Louisville*, 5 Dana, 28; *Jacob v. Louisville*, 9 Dana, 114; and *City of Lexington v. McQuillan's Heirs*, Id. 513, in the court of appeals of Kentucky. Without entering into an extended examination of these cases, we do not think they can be carried to the extent claimed for them; but if they could, they must be regarded as very much restricted by the subsequent decisions of that court, and especially by the case of *Slack et al. v. Maysville and Lexington R. R. Co.*, decided in 1852.

On the whole, we are of opinion that the injunction should be dissolved, and the bill dismissed.

Bill dismissed.

***EDMUND CLARK v. THE CITY OF CLEVELAND AND OTHERS. [139**

THIS was also a bill to enjoin the collection of an assessment made under the ordinance referred to in the preceding case.

The facts are the same substantially as in *Scovill v. The City of Cleveland*, and the opinion in that case disposes of this.

Bishop, Backus, and Noble, for complainant.

Horace Foot, Willey & Carey, and John C. Grannis, for defendants.

Bill dismissed.

PERRY D. VEACH v. BENJAMIN ELLIOT.

The third and fourth sections of the statute for the prevention of gaming apply as well to betting on elections as to any other bet.

The act to punish betting on elections, and the act more effectually to prevent gambling, have operated to supersede a portion of the seventh and eighth sections of the gaming act, but have not repealed other sections of that statute.

THIS is a writ of error to the common pleas, reserved in Licking county, by the late supreme court for decision in bank.

Veach v. Elliott.

The action in the court of common pleas was debt under the provisions of the fourth section of the "act for the prevention of gaming" (Swan's Stat. 427). The declaration alleges that one William Veach, and the defendant, made a bet on the result of the presidential election of 1848, which was won by defendant, and the money, five hundred dollars, paid over to him, and that said William 140] Veach had failed to bring *suit to recover it back within six months, the time limited by the statute.

To this declaration there was a general demurrer, which was sustained by the common pleas, and judgment rendered for defendant.

Perry D. Veach, in his own person.

James R. Stanbery, for defendant in error: *Thomas v. Cronise*, 16 Ohio, 54.

CALDWELL, C.J. The only question arising is whether there is any law authorizing recovery in a case of this kind.

In behalf of the defendant in error, it is contended that the statute for the prevention of gaming does not apply to betting on elections.

The second section of the statute provides: "That if any person or persons, by playing at any game or games, or by means of any bet or wager, shall lose, to any other person or persons, any sum of money or other thing of value," etc., that "at any time within six months next after the loss and payment, etc., the person losing may sue and recover the same in an action of debt."

The fourth section of the act provides that if any person or persons, losing such money or thing, shall fail to bring suit for six months, it shall be lawful for any person, by such action, to bring suit for and recover the same. Swan's Stat. 427.

The language of the statute is general, comprehending in its terms every kind of bet or wager, and we do not see that betting on elections can be taken without its provisions. We suppose the object of the legislature was to operate on and render void the results of betting, without reference to the nature of the future event to which the bet may have had relation.

We have been referred by counsel for defendant to the case of *Thomas v. Cronise*, 16 Ohio, 54, as a decision in their favor. That was a bill in chancery, filed for the purpose of recovering property lost by a bet on the election of Governor of Ohio in 1842. The

court held that the parties *being in *pari delicto*, a court of [141] chancery would not interfere. This is a well-established principle of jurisprudence. The court, however, say, after placing the decision on this ground, "There is no statute which gives relief in a case of this kind, either in a court of law or equity." Now, whilst we concur fully in that decision, we can not acquiesce in this *dictum*.

It is to be observed, that this statute treats the subject of gaming and betting in a double view; it makes all contracts of that kind void, and provides that the money which may have been lost may be recovered back by an action of debt. The seventh and eighth sections make betting and gaming an offense to be prosecuted by indictment and punished by fine. These penal sections have been to some extent superseded by the statute to punish betting on elections, Swan's Stat. 254, and the statute "more effectually to prevent gambling," 44 Ohio L. 10, Curwen's Rev. Stat. Chap. 626, by which these offenses are made more highly penal; but the other sections of the gaming act, under which this suit is brought, still remain in full force. We think, then, that the court of common pleas erred in sustaining the demurrer to the declaration. The judgment, therefore, will be reversed.

Judgment reversed.

NORMAN C. BALDWIN ET AL. v. THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF MASSILLON.

Where a deed of conveyance for several tracts of land was delivered by grantor to grantee or his agent, who acknowledged the receipt of the same, but in so doing added a condition that the deed should be received in satisfaction of a bond of the grantor and others, held by the grantee, in case the grantor's title to the premises mentioned in the deed should be found on an examination of the records to be good, and the grantee, after retaining the deed for some months, and ascertaining that the title was defective as to part of the lands described in the deed, handed the deed back to the *grantor or his co-obligor in the bond, the title to that part of the [142] lands of which the grantor was seized, passed to the grantee, and was not reconveyed by the mere return of the deed.

Where the court of common pleas erred in ruling as to a material fact in the defense, and the bill of exceptions does not profess to show all the evidence, so as to enable this court to ascertain that the defendants were not

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prejudiced by such erroneous ruling, a judgment against the defendants will be reversed.

ERROR to the common pleas of Summit county, reserved by the late supreme court on the circuit, for decision by the court in bank.

The action in the court below was debt on a bond made by Norman C. Baldwin and Frederick Baldwin as principal debtors, and Van R. Humphrey as surety, to the bank of Massillon.

The defendants pleaded in bar:

First. Non est factum.

Second. That on 1st January, 1843, Frederick Baldwin, one of the defendants, delivered to the Bank of Massillon "a certain deed of conveyance, containing the usual and full covenants of warranty and seizin—executed by himself and wife—therein and thereby conveying to the bank certain real estate in fee simple," to-wit: five city lots in Ohio City; 44 acres of land in tract 82, township 3, at the Rapids of the Miami of Lake Erie; the southeast quarter of section 22, township 6, north, range 11, in Wood county, and an undivided half of the north half of the southwest quarter of section 27, in town, range, and county last named, "in full satisfaction and discharge" of the amount due on said bond; "which said deed, *and the premises therein mentioned and described*, the bank then and there accepted and received in full satisfaction and discharge," etc.

The plaintiff replied:

1. *Similiter*, to the plea of non est factum.

2. To the plea of accord and satisfaction, that Frederick Baldwin "did not deliver the said deed of conveyance, or *con- 143 vey the said several premises to the bank in full satisfaction," etc., "nor did the bank accept and receive the same in full satisfaction and discharge," etc., concluding to the country.

The cause was tried to a jury on these issues, and resulted in a verdict and judgment in favor of the bank, for \$6,340.29, and costs. A bill of exceptions was taken during the trial, from which it appears, that on the 12th of December, 1840, the plaintiffs in error made their bond to the Bank of Massillon for \$3,889.75, payable in six months, with interest. On the 24th of January, 1843, the bond being still unpaid, Frederick Baldwin, one of the makers (in accordance with an arrangement previously made, and hereinafter stated), sent to Parker Handy, cashier of the bank, a deed, with the usual

covenants of warranty and seizin, made by himself and wife, and which purported to convey to the bank in fee simple the various premises mentioned in the plea of accord and satisfaction. Upon the receipt of the deed, Handy addressed a letter to Baldwin, expressing the exact arrangement between them, which constitutes the accord relied on by the plaintiffs in error, and is as follows :

BANK OF MASSILLON, Jan. 24, 1843.

"DEAR SIR :—I have this day received a deed executed by yourself and wife, for the following lots of land : (here follows an enumeration of the same premises described in the plea). The above lands we are to receive for the payment of a certain bond, dated Dec. 12, 1840, for \$3,889.75, and interest from date, which now amounts to \$4,381.84. Said bond is signed by N. C. Baldwin, F. Baldwin, and Van R. Humphrey. *The above LAND is to be received for the liquidation of said bond, if upon the examination of the records the title is found to be good and unquestionable to all of said tracts or parcels of land.* I shall be at your place this week, and will call and see you.

P. HANDY, Cashier.

"F. BALDWIN, Esq."

At the time of this conveyance, neither Frederick Baldwin nor his wife had a good title to all of the several tracts of land mentioned in the deed. On the receipt of the deed, Handy sent [144] it to Messrs. Spink & Hosmer of Wood county, in which all the lands but the Ohio City lots were situated, with instructions to examine the title to the lands in that county, and if they found it to be good, to have the deed recorded—otherwise to have it returned without record. Finding the title to be defective, Messrs. Spink & Hosmer withheld the deed from record, retaining it, however, for further instructions from Handy. The Baldwins were notified that the title was defective, and they promised to have it made good ; but in August or September of the same year, the title to a part of the lands still being imperfect, Handy delivered the deed to Norman C. Baldwin, in the presence of Fredrick Baldwin.

The court, among other things, charged the jury :

"That, under the plea of accord and satisfaction, as interposed in this case, it was incumbent on the defendants to show, to the satisfaction of the jury, that Baldwin and wife, or one of them, had a good title to all of the lands described in their said deed to the plaintiff, at the time of their execution and delivery of the convey-

ance, for such deed would not convey lands to which the grantors had no title.

"That to constitute a valid legal delivery, so as to vest title in the grantee, two things were necessary: a delivery of the deed by the grantor to the grantee, with intent to deliver, and an acceptance thereof by the grantee, with intent to accept; for no man could be made a grantee without his acceptance, either expressed or implied.

"That the defense of accord and satisfaction rests upon the agreement of the parties, and not in the simple reception of property, and, therefore, that the conveyance by Baldwin and wife to the plaintiff, of a part only of the lands mentioned in their deed (even though the title to such part vested in the plaintiff), would not be a satisfaction of the bond, unless such was the agreement of the parties; and that the existence or non-existence of such agreement was a question of fact for the jury."

The counsel for the defendants requested the court to charge the jury as follows:

"1. That if they find that defendant, Fredrick Baldwin, in person or by his agent, for the purpose of paying the bond on which this suit was brought, delivered to the plaintiffs a duly executed deed, from himself and wife to plaintiffs, of land, which deed the plaintiffs received, but with an understanding and agreement between 145] the parties, or upon the condition, declared by the *plaintiffs at the time, that said deed should pay and satisfy said bond, if, upon examination of the records, the title to all of said lands should be found good; but otherwise it should not operate as a satisfaction—such condition, either stipulated or declared, did not prevent the transmission from said Baldwin and wife to plaintiffs, *eo instanti*, of such title as the grantors had in the lands described in the deed.

"2. That, in order to divest the plaintiff of such title, and restore it to the grantor on the discovery of defects in the title, to a portion of the lands, a mere return of the deed to the grantor was not sufficient in law, but it was necessary to the restoration to Baldwin of the title to such portion of the lands as he had a good title to, at the time of his conveyance to plaintiffs, that plaintiffs should have executed and delivered to said Baldwin, in due form of law, a deed releasing or conveying to him such title as plaintiffs had in the transactions received from said Baldwin and wife.

"3. That, if the jury finds that no such re-conveyance or release

was made by plaintiffs to said Baldwin before the commencement of this suit, the effect in law of thus retaining the title to such portion of said lands as the grantors, Frederick Baldwin and wife, had and conveyed to plaintiffs (though not covering all the lands mentioned and intended to be conveyed in said Baldwin's deed to plaintiffs), would be to fasten upon the plaintiffs such title and lands as were transmitted, in manner aforesaid, from Baldwin and wife to plaintiffs, as being by implication or operation of law accepted and received by plaintiffs in satisfaction of said bond, and would amount in law to a waiver by plaintiffs of conditions agreed upon or declared in relation to the validity of the title to all of said lands upon which plaintiffs would accept said deed from Baldwin and wife in satisfaction of said bond.

"4. That, although the jury should find that said deed was received by plaintiffs with an express condition (but not inserted in the deed) that it should apply in satisfaction of said bond only in case that a good record title to all of the lands embraced in said deed should be found, on examination of the records, to exist, it was incumbent on the plaintiffs before commencing this suit, at least to have restored or tendered said deed back to Baldwin; that a return of the same to Norman C. Baldwin, though in the presence of Frederick Baldwin, was not sufficient for that purpose; and in the absence of proof of such restoration to Frederick Baldwin, the plaintiffs are estopped from denying that said deed was accepted and received in satisfaction of said bond."

But the court charged the jury on the points, so as aforesaid made by defendants' counsel, as follows:

First. "That no title would be transmitted from Baldwin and wife to plaintiffs, of any portion of said lands at the instant of delivery, under such circumstances or conditions."

Upon the second and third points the court charged "that if the title to any portion of the lands embraced in said deed was defective, it was not incumbent on plaintiffs to convey to said Baldwin, before commencing suit, such *title as plaintiffs might have [146 received (if, in fact, a title to some portion, but less than the whole of said lands did pass to said plaintiffs); nor would their retaining such title to any portion less than the whole of the lands described in the deed amount in law to an acceptance of the same by plaintiffs in satisfaction of said bond; nor would it be a waiver of any condition in relation to the title, upon which plaintiffs accepted

the deed; inasmuch as it would amount to only a part execution of the accord."

On the fourth point the court charged "that if the title to any portion of the land embraced in the deed were defective, it would not be incumbent on plaintiffs, before commencing the suit, to return or tender said deed to any one; and they would not, by reason of their having neglected to return or tender said deed to said Frederick Baldwin, be estopped from denying that they had accepted and received said deed in satisfaction of said bond."

The charge of the court as above given, and the refusal to charge as requested, are now assigned for error.

M. Birchard, for plaintiff in error.

Title vests the moment a deed is placed in the hands of grantee with intent to furnish a muniment of title. 2 *Greenleaf's Cruise*, Title 32 Deed, ch. 2.

Title vests by delivery of a deed, and is not divested by returning it immediately to the grantor. 8 Ohio, 81; 2 Id. 266; 1 Id. 327.

Geo. Kirkum, on the same side. *Blackburn's Lessee v. Blackburn*, 8 Ohio, 81; 2 Black Comm. 309; *Unger v. Wiggins*, 3 Rawle, 331.

Otis & Wolcott, for defendant in error.

The defense of accord and satisfaction rests upon the agreement of the parties, and not on the simple conveyance or acceptance of property. 1 Saund. Pl. & Ev. 23; 3 Steph. Comm. 273; *Chitty's Pl.* 613; 1 Brigh. W. C. 502; 7 Ad. & El. 134; 4 Denio, 418.

An accord in part executed is not a bar. The satisfaction agreed on must be fully performed to constitute a defense. 6 Wend. 390; 8 Ohio, 394.

All the later authorities concur in declaring that, to vest title in the grantee, the deed must not only be delivered to, but accepted [147] by him. 1 Johns. Cas. 114; 12 Johns. *418; 20 Johns. 187; 6 Cow. 619; 1 Barb. 617; 12 Mass. 476; 3 Met. 275.

Although a deed may operate as against the grantor by a presumed acceptance until a dissent or disclaimer appears, it then becomes inoperative and void. 2 Vent. 198; 3 Prest. Abst. 104; 6 Watts & S. 331; 12 Mass. 476; 2 Wend. 317.

What shall amount to a delivery or an acceptance of a deed, so as to pass title, depends mainly on the circumstances and intentions of the parties, and is a question of fact for the jury. 2 Barn. &

Cres. 82; 2 Mass. 452; 5 Con. 555; 13 Pick. 75; 1 Penn. 32; 7 Ohio, part 2, 50.

R. P. Spalding, for plaintiff in error in reply. Under the plea of accord and satisfaction it was not incumbent on the defendants below to show that Baldwin had a good title to all the lands described in his deed at the time of its execution and delivery. *Reed v. Bartlett*, 19 Pick. 273.

If the party has a remedy to compel the performance, an accord with promise to perform is good. *Comyn's Digest*, title Accord, b. 4.

Such title as Frederick Baldwin had in the lands must of necessity have passed to the bank at the instant of delivery of the deed. The court erred in saying to the jury that no title would be transmitted from Baldwin of any portion of the lands, if the title to any part failed.

The deed was in the hands of the grantee, with the consent of the grantor, and with his intent that it should operate as a muniment of title to the grantee. This was a delivery in the law. "*In traditionibus chartarum non quod dictum, sed quod actum est, inspicitur.*"

It was also error in the court to say that plaintiffs below need not reconvey to Baldwin such title as they might have received in the lands, if the title to any part was defective before commencing suit on the bond.

BARTLEY, J. The court of common pleas clearly erred in ruling that, under the circumstances and conditions stated in *the [148 first request of defendants, no title would be transmitted from Baldwin and wife to the bank of any portion of the lands in the deed described. The deed was delivered by Baldwin and wife to the bank, through its authorized agent, who acknowledged the receipt of it. The condition affixed by the stipulation of the cashier did not affect the delivery of the deed, but applied only to the application of the land in satisfaction of the bond. The delivery of a deed by a grantor, and the reception of the same by the grantee, as such, *eo instanti*, passes the title to the grantee, so far as the grantor is capable of conveying it. It has been held that the delivery of a deed as an escrow must be to a third person; for if the grantor delivers a deed to the grantee himself, to whom it is made as an escrow upon certain conditions, the delivery is absolute, and

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the deed will become operative immediately. Shep. Touch. 59; Moore, 642; Co. Litt. 36, *a*; 9 Rep. 137, *a*; Hob. 246.

Baldwin did not make Handy his agent, to hold the deed as an escrow for the bank; on the contrary, he delivered the deed to Handy as the grantee, he being the representative of the bank. When a deed is delivered as an escrow, it is the grantor who prescribes the terms on which it shall pass to the grantee, and become operative as a deed. But here the delivery by Baldwin, the grantor, was absolute, and the condition was prescribed by Handy on behalf of the bank, and with express reference only to the application of the land in satisfaction of the bond.

The first important step to be taken by the defendants to maintain their special plea, was to show the execution and delivery of the deed conveying the lands mentioned to the bank. And although Baldwin and wife, not having legal title to a small portion of the lands, conveyed only that part of which they were seized, yet the bank receiving the deed with covenants of warranty and seizin, may have so acted and treated the deed as to be estopped from denying that it was received in satisfaction of the bond. While the pleadings were not, perhaps, such as to allow the defendants to set **149]** up *a waiver of strict performance on their part, yet facts and circumstances in the conduct of the bank, which would amount to an estoppel to the bank from denying the satisfaction of the bond, might well have been insisted upon under the plea. And inasmuch as the bill of exceptions does not profess to contain all the evidence, this court can not undertake to say that the defendants were not prejudiced by such erroneous ruling by the court.

Other errors are assigned for the reversal of the judgment, but the court do not deem it necessary to take time to consider them here.

Judgment reversed.

THE COMMISSIONERS OF THE ROLLERSVILLE AND PORTAGE FREE
TURNPIKE ROAD v. THE COMMISSIONERS OF SANDUSKY COUNTY.

The act of February 20, 1851, to create the Rollersville and Portage Free Turnpike Road, authorized, but did not require the levy of the tax therein specified by the commissioners of Sandusky county.

Where authority is conferred upon a public officer, to be exercised at his discre-

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tion, and where no act has been done by him under such authority, and no private rights have intervened, the courts can not compel him, by mandamus, to exercise such discretionary power.

THIS is an application for a peremptory mandamus, reserved in Sandusky county.

The relation sets forth that the relators, by an act of the legislature of Ohio, passed February 20th, 1851, were appointed commissioners to lay out and establish a free turnpike road in the counties of Wood and Sandusky. That they and their successors in office were by said act created a body corporate, by the name and style of the Rollersville and Portage Free Turnpike Road. That said act further directed the county commissioners of Wood and Sandusky counties, annually, at their June session, for five successive *years, to levy a tax for the construction and maintaining of [150 said road, on all lands lying within one mile of said road, on each side thereof, at the rate of two cents per acre; and on all lands lying more than one mile from said road, and within two miles thereof, at the rate of one cent per acre. That relators, previous to the first day of June in said year, had been duly qualified according to law, and had frequently requested the commissioners of Sandusky county to levy said tax, which they have ever refused to do.

To this relation the defendants answer, setting forth: That said act is not directory—merely permissive. Second, that the same is unconstitutional. And third, that the act has been repealed. To this return the relators have demurred; and, on a motion for a peremptory mandamus, the cause was reserved for decision to this court.

Smith & Murray, for the relators. Cited, *Smith on Statutes*, 727; 3 Hill, 612; *Rex v. The Mayor of Hastings*, 1 Dowl. & R. 148; *Rex v. Barlow*, 2 Salk. 609; *Blackwell's case*, 1 Vernon, 152; *Rex v. Inhabitants of Derby*, *Skinner*, 370.

Dickinson & Hayne, for defendants.

CORWIN, J. The second section of the act of February 20, 1851, provides that said road commissioners "shall be governed in all their proceedings by the provisions of the act for laying out and establishing free turnpike roads, passed March 12, 1845, and the acts amendatory thereto, except so far as the same may be modified or changed by this act." And the language of the 3d section of said act is as follows:

"That for the purpose of constructing said road and keeping the same in repair, the county commissioners of the counties of Sandusky and Wood are hereby authorized, annually, at their June session, for five successive years, to levy a tax," etc.

There is no other provision in the said act for levying such tax by the county commissioners, either permissive or mandatory, and 151] the first question presented for our consideration *is, whether the provisions of the third section of said act absolutely require such tax to be levied, or whether they merely give authority to the county commissioners to levy such tax at their discretion. It must be conceded that if the exercise of such authority is left by law to the discretion of the county commissioners, that discretion must be exercised in their own way, and upon their own responsibility; and when no act has been done by them under such authority, and no private right has intervened which requires protection, no other tribunal is authorized to interfere with and control that discretion, whatever differences of opinion might be entertained as to the propriety or impropriety of the action of said commissioners. And the great protection against the abuse of such discretion, or the failure or refusal to exercise it for the promotion of the public welfare, is found in the right of the public, by their own act, to change the officers in whom such discretion is vested.

But it is claimed by counsel for the relators that "words of permission are to be construed as imperative in all cases where a public body or officers have been clothed by statute with authority to do an act which concerns the public interest, or the rights of third persons;" and, indeed, in some of the authorities cited, the language employed would make the rule as broad as it is claimed by counsel; but such a rule must be considered with reference to the facts and circumstances of the case in which it is declared.

In the case of the Mayor of the City of New York v. Farge, 3 Hill, 612, the authority of the public officers had been so far exercised as to devolve upon them the obligation to continue its exercise for the protection of the rights of third persons.

Under a general authority to construct basins, culverts, and sewers, in Pearl street, designed for conducting and carrying off the water running in and upon the same, and to keep the same in repair, the sewers had been constructed and water permitted to flow 152] therein, and the question was whether the *officers of the

city government, having exercised the power of constructing the sewers, were not also subjected to the duty of keeping the same in repair and free from obstructions for the protection of the adjacent property-holders. We think it was properly held in that case that such obligation had devolved upon the city authorities; but this case is clearly distinguishable from that. Here, the commissioners of Sandusky county have done no act by which any one may be prejudiced. The legislature has "authorized" them to levy a tax for the construction and maintenance of a free turnpike road through their county. They have simply declined to exercise the power thus conferred. They do not wish to construct such a road by such means. No such road has been constructed in said county. No debt or liability has been created on account of it, and they have levied no tax for such purpose.

These relators, although called in the act of February, 1851, a body corporate, are subjected to the provisions of the act of March 12, 1845, by which they are required to give bond at the discretion of the county commissioners, to take an oath of office, make annual statements to the office of the county auditor, and under certain circumstances, are removable from office at the pleasure of the county commissioners. With such provisions, it can hardly be said that the discretion of the county commissioners is to be controlled and regulated by the discretion of the road commissioners.

These relators have no interest in the free turnpike road, except in so far as they may be considered as representing the interests of the public. It is in fact the public asking a peremptory mandamus from this court to compel their own agents to tax them, and it is a sufficient answer to this request to say that they may build such a road if they see proper, and pay for it in such mode as they may deem best; and if they prefer that it be done through the agency of their own commissioners, they have it in their power to select commissioners who, under the authority conferred by the legislature, will tax them to their satisfaction.

*With this view of the case, it is unnecessary to notice the [153 other questions argued by counsel. It is unimportant to inquire whether the commissioners in this free turnpike road have a "vested right" to have this tax levied, which can not be interfered with by a change of our organic law, or whether the rule of taxation prescribed by these acts of legislation is consistent with the

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rule provided by the constitution of 1851. Such questions would only arise if the commissioners should choose to exercise the powers conferred by the acts of the legislature, and it was sought to restrain them from the exercise of such authority.

Peremptory mandamus refused.

OLIVER LOOMIS v. PLATT R. SPENCER ET AL.

The provisions in the charter of the "Lake and Trumbull Plank Road Company," passed February 14, 1849, by which the trustees of certain townships are respectively authorized to subscribe to the capital stock of said company if a majority of the qualified electors of the townships, respectively, assent thereto, is not in contravention of the constitution of 1802.

A county treasurer who seizes property to pay a tax assessed without any color of law for its assessment, or under an unconstitutional law (which is the same as no law) is liable in trespass.

But where a valid law provides for the tax, and the illegality of the particular assessment is owing to some error or omission of those charged with the execution of the law prior to the treasurer being called upon to act (that is, prior to the delivery of the duplicate to him), and the duplicate is regular on its face and duly certified, he is not liable for collecting the tax. In such a case the duplicate affords as ample protection to the treasurer as does an execution regular on its face to a sheriff.

The remedy of the tax-payer is against the person or persons who illegally assess the tax or cause it to be done.

The cases of "The Cincinnati, Wilmington and Zanesville Railroad Company v. The Commissioners of Clinton County," (ante, p. 77,) and "The Steubenville and Indiana Railroad Company v. The Trustees of North Township, Harrison County," (ante, p. 105,) approved and affirmed.

THIS is a writ of error to the common pleas of Ashtabula, reserved by the late supreme court for decision in bank.

154] *The facts sufficiently appear in the opinion of the court.

Wilder & Lee, for plaintiff in error.

Birchard, Chaffee, Woodbury & Perkins, for defendants in error.

Little v. Merrell, 10 Pick. 547; 4 Pet. 565; 3 Dall. 400; 4 Wheat. 436; 24 Wend. 69; 15 Conn. 497; 1 Bald. C. C. 74; Smith's Comm. 259; 2 S. & Watts, 285; 10 Watts, 66; 20 Wend. 281; 1 Kent's

Comm. 488; 8 Leigh, 154; Id. 526; 15 Conn. 501; 9 Dana, 521; 9 B. Mun. 399; Id. 335; Id. 538; 9 N. H. 271; 4 Har. 495; 6 How. 672; 20 Wend. 382; 13 Pick. 61.

THURMAN, J. The original action was trespass for taking a cow belonging to plaintiff. Plea, not guilty, with a notice of justification, the substance of which is, that Spencer was, when, etc., treasurer of Ashtabula county, and Preston & Stevens, the other defendants, his deputies. That the county auditor, in pursuance of the statute, on August 31, 1849, delivered the tax duplicate of the county, duly certified, to said treasurer, for him to collect the taxes assessed thereon. That upon said duplicate there was assessed against the plaintiff, a resident tax-payer of Windsor township in said county, certain taxes, to-wit: \$10,021 on his real estate, and \$4,093 upon his personal property. That plaintiff having failed and refused to pay said taxes, or any part thereof, and the same remaining due, Spencer, as treasurer as aforesaid, by his said deputies, distrained said cow for the payment thereof, pursuant to the statute, which is the same supposed trespass in the declaration mentioned, all of which took place before the annual settlement of the treasurer with the county auditor for the year 1849.

Upon trial, a verdict was rendered for the defendants, and judgment being given thereon the plaintiff tendered a bill of exceptions which was signed and sealed. To reverse said judgment this writ is prosecuted.

By the bill of exceptions it appears that the defendants offered to prove, upon the trial, their official character aforesaid, *and [155 that the cow was taken and distrained for the payment of a plank road tax assessed against the plaintiff, to the admission of which testimony the plaintiff objected, but his objection was overruled and the testimony given. The defendants after giving further testimony rested in chief, whereupon the plaintiff proved that prior to the taking said property he had paid all the taxes assessed against him on said duplicate, except said plank road tax. He then offered to prove that no vote had been taken by the people of Windsor township on the question of making a subscription by the trustees of said township to the capital stock of the "Lake and Trumbull Plank Road Company," which testimony was objected to by the defendants, and the objection sustained by the court.

The evidence being closed, the plaintiff asked the court to instruct the jury :

1. That the act of February 14, 1849, so far as it attempted to authorize the taxing of the people of said township for the payment of any subscription to the capital stock of said company, is unconstitutional and void, and affords no protection to an officer who attempts to collect a tax from them under its provisions.

2. That for the legal justification of the treasurer, in the collection of said plank road tax by the distress and sale of plaintiffs property, the treasurer is bound to prove that the provisions of the act of incorporation aforesaid, so far as the same required the assent of the people of Windsor township to be given to a subscription to the capital stock of said company, prior to any such subscription or the assessment of any tax therefor, had been complied with.

Which instructions the court refused to give, and did instruct the jury :

1. That said act of incorporation is a valid and constitutional law.

2. That it was not necessary to their full justification for the defendants to prove that the provisions of said law, or any of them, [56] beyond what appeared on the face of said *tax duplicate, had been complied with, and that said duplicate was sufficient evidence of authority on the part of the treasurer to collect all the taxes appearing thereon.

To which the rulings of the court, refusal to charge as asked, and the charge as given, the plaintiff excepted, and the same matters are now assigned for error, together with the general assignment that judgment was given for the defendants instead of for the plaintiff.

The constitutional question presented by the record is the same question that was decided at the March term of this court, in the cases of "The Cincinnati, Wilmington & Zanesville R. R. Co. v. The Comm'rs of Clinton Co.," ante, 77, and The Steubenville & Indiana R. R. Co. v. The Trustees of North Township, Harrison County, ante, 105, and we see no reason to depart from those decisions.

As to the testimony offered by the defendants and objected to by the plaintiff, it was plainly proper evidence and properly admitted.

The refusal of the court to permit the plaintiff to prove that no vote had been taken by the people of Windsor township on the

question of a subscription to the stock of said company, raises the point on which the decision of the case turns. The second section of the act of incorporation aforesaid, authorized the trustees of certain townships to subscribe within a given amount to the capital stock of said company. The third section authorizes them to borrow money, or issue bonds or orders, at a rate of interest not exceeding six per centum per annum, on the credit of the township, in order to pay the subscription. The fourth section provides that "annually in each and every year after such subscriptions shall have been made by any township, the county auditor of the proper county shall levy on the grand list of said township such taxes as, together with the tolls arising to such township from said stock, will pay the interest of such loan, or bonds, or orders, and all incidental charges connected therewith, together with the fifth part of the principal of said loan, or bonds, or orders; and to enable him so to do, it shall *be the duty of the township trustees annu- [157 ally and before the first day of June in each year, to report to the proper county auditor the amount of their loans, or bonds, or orders unpaid, and the amount of their tolls aforesaid, and such other information as such auditor shall require, necessary for the purpose aforesaid; and on failure of said trustees so to do, such auditor shall levy a sufficient tax as aforesaid, predicated on the original amount so subscribed for the particular township, or on the last report of the trustees thereof, as the case may be, and without regard to the tolls received.

Sec. 5 provides that, "The tax so assessed shall be placed on the county duplicate and collected as in other cases, and the proceeds held by the county treasurer subject to the control of the township trustees for the purposes aforesaid."

Sec. 9 provides "That no subscription shall be made by the trustees of any township without the assent of the people, to be signified by a vote of the qualified electors, in the manner therein prescribed;" and,

Sec. 10 requires the return of the vote or election to be made to the county auditor within two days after such vote.

It is not denied that, in the case under consideration, a subscription to the capital stock of said company was made by the trustees of Windsor, nor that the county auditor assessed a tax in the manner pointed out by said charter, nor that he delivered the duplicate properly certified to the county treasurer for collection;

nor is it pretended that the treasurer acted in bad faith or with knowledge of any fact making said tax illegal; but it is alleged (and for the purposes of this suit it must be admitted) that said subscription was unauthorized by a vote of the electors of Windsor, and the question is whether this fact renders the treasurer and his deputies liable to an action of trespass for distraining the plaintiff's property.

That a treasurer who seizes property to pay a tax assessed, with-
158] out any color of law for its assessment, or under an *unconstitutional law (which is the same as no law), is liable in trespass, seems to have been decided in *McCoy v. Chillicothe*, 3 Ohio, 370, and impliedly admitted in *Ragnet v. Wade*, 4 Ohio, and we have no doubt that such is the law.

But that he is so liable where a valid law provides for the tax, and the illegality of the particular assessment is owing to some error or omission of those charged with the execution of the law prior to the treasurer's being called upon to act, that is, prior to the delivery of the duplicate to him, has never been held in Ohio, so far as we have been able to ascertain. Nor do we see, either upon principle or authority, why he should be liable in such a case, while the reasons for a contrary opinion seem to us quite satisfactory. He, like every one else, is bound to know the law, and if he seizes property to pay a tax wholly unprovided for by law, or provided for only by an unconstitutional law, it is right that he should be held liable. There is as much reason in such a case for sustaining an action against him as against any other officer, and the taxpayer ought not to be remediless. But, on the other hand, he is not bound to know all the facts that have occurred, or omissions of duty that have taken place prior to the time fixed by the law when his duties in the premises commenced. He is not called upon to act until the duplicate is delivered to him, and when it is so delivered, duly certified and apparently legal on its face, the law requires him to collect the taxes therein assessed, and is as mandatory upon him as a writ of execution is to a sheriff, and ought, in general, to be an equal protection. In *Taylor v. Alexander et al.*, 6 Ohio, 147, the court said: "The principle is well established, that executive officers, being obliged to execute process, are protected in the rightful discharge of their duty, provided the process issued from a court or magistrate having jurisdiction of the subject-matter. And if the magistrate proceed unlawfully in issuing the

process, he, and not the executive officer, will be liable for the injury."

*And, again: "It does not comport with law or correct [159 policy to permit an executive officer or those he commands as his posse to examine into the regularity of the proceedings of the court whose process they execute, or to confer upon them authority to proceed or forbear as they may judge best. The rule that holds them to know the extent of jurisdiction requires for its justification some legal subtlety, but rests on far different grounds from that urged by the plaintiff."

Now, without meaning to say that the cases of sheriff and treasurer are, in all respects analogous, it yet seems to us that the above quoted remarks have much weight upon the preceding question. The treasurer's duties are wholly executive. He has nothing to do with the listing of property or assessment of taxes. His sole business in respect to taxes is to collect, keep, and disburse them according to law. Suppose our law was similar to that of some of the other states, and the defendants had distrained the property in question under a warrant issued by the assessors of a tax, would not that be process under which they would be protected? But our statute which requires him to collect the taxes on the duplicate is as high and compulsory authority as any warrant can be. The law and duplicate are his warrants; and if the former is valid and the latter duly certified and regular on its face he is protected. Nor does this view leave the tax-payer whose property is illegally taken without remedy. His action is against him who committed the fault that renders the assessment illegal. It may be the auditor, it may be the assessor. We can suppose a case in which it would be the county commissioners or township trustees; but it is not the treasurer, who has committed no fault; and these views are fully supported by the authorities. In Massachusetts it seems to have been uniformly held that it is the assessors of the tax and not the collectors of it who are liable—(the law under which it is levied being constitutional.) The precise point was decided in *Little v. Merrill*, 10 Pick. 547, in which the court say: "If this action will not lie against the *assessors, the plaintiff is remediless. The [160 collector being a mere ministerial officer and acting in pursuance of a regular warrant from a tribunal acting on a subject within their jurisdiction, is not liable." See, also, *Libby v. Burnham et al.* 15 Mass. 144; *Coburn et al. v. Richardson*, 16 Mass. 213; *Gage v*

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Cuvier et al., 4 Pick. 399; Ingle v. Bosworth et al., 5 Pick. 498; Withington v. Eveleth, 7 Pick. 106.

In *The Trustees of Rochester v. Symonds*, 7 Wend. 395, the court, speaking of a warrant for the collection of taxes, say, "As the trustees had authority under certain circumstances to issue a warrant, they had jurisdiction of the subject-matter; and if the trustees had issued it without first demanding payment, *the collector would be justified in enforcing it, though the trustees themselves would not.* It is not the duty of a ministerial officer, nor has he the right to refuse to execute process regular upon its face, and issued by any court or person having jurisdiction." The opinion we have expressed disposes of the exception to the refusal of the court to give the charge prayed for, and the objection to the charge as given, as well as the supposed error in rejecting the plaintiff's testimony. Nothing remains but the general assignment of error, and we find nothing in the record to support that. The judgment must be affirmed.

RANNEY, J., having been of counsel, did not sit in this case.

**SAMUEL LANDIS AND JACOB VANIMAN, EXECUTORS OF JOHN URMEY,
DECEASED v. LEVI WOODEN, ELIZABETH, HIS WIFE, ET AL.**

A residuary clause in a will in these words: "The remainder of my estate I do hereby give and devise to the poor and needy, fatherless, etc., of two townships named, "to such poor as are not able to support themselves, to be divided as my executors may deem proper without any partiality," is valid and effectual for the purposes therein expressed.

The courts of chancery in this state, upon general principles independently of the statute of charitable uses, 43 Elizabeth, have jurisdiction to enforce such trusts.

[161] *The spirit and policy of the act for the relief of the poor, Swan's Stat. 637, section 13, would also confer such jurisdiction and sustain the bequest. No trust will fail for the want of a trustee. A court of chancery will supply the defect.

THIS is a bill in chancery reserved in Montgomery county.

The will of John Urmev is dated April 25, 1844, and was admitted to probate in the common pleas of Montgomery county at

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the August term, 1846. Amongst other legacies are the following:

"I give and devise to my beloved son, John Q. Urmey, son of Sarah Kinsey, three thousand dollars.

"I give and devise to my esteemed friend, Elizabeth Hipple, one thousand dollars."

After providing that if any of his legatees should die leaving no lawful heirs, "then the money willed to them shall fall to the use of the poor and needy, in Jefferson and Madison townships, of Montgomery county," the testator disposes of the residue of his estate by the following words:

"And the remainder of my estate, I do hereby give and devise to the poor and needy, fatherless, etc., of Jefferson and Madison townships, of the county aforesaid, to such poor as are not able to support themselves, to be divided as my said executors may deem proper without any partiality."

The executors are authorized to sell the real and personal estate.

John Q. Urmey, the legatee named above, was illegitimate. The testator after the making of his will, married Elizabeth Hipple, also a legatee, and died, never having had legitimate children, leaving Elizabeth, his widow, who subsequently intermarried with Levi Wooden.

The executors having converted the estate into money, paid the debts and valued legacies, and settled their account as executors, invoke the aid of a court of equity as to the disposition to be made of the residue of the fund in their hands.

*The bill makes defendants, 1. The brothers and sisters of [162] testator, who claim to be heirs at law, there being no legitimate children; 2. John Q. Urmey, who claims that he is recognized by the clause in the will before quoted, as son and heir at law; 3. Levi Wooden and wife, who claim in right of the wife, that she, as widow of testator, is next of kin, and entitled to distribution of one-half of the first four hundred dollars, and one-third of the residue; 4. The trustees respectively, of Jefferson and Madison townships, Montgomery county, who claim the fund for the objects of the testators bounty, the poor and needy, fatherless, etc., of those townships. The other defendants insist that the bequest of the residue to the poor, etc., of those townships is utterly uncertain and indefinite as to the objects of the bequest, and is therefore void.

Eli J. Forsythe, for the trustees. 2 Story's Eq. 390; Zanesville

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Canal & Manufacturing Co. v. City of Zanesville, 20 Ohio, 483; *Witman v. Lex*, 17 Serg. & R. 88; 9 Cowen, 437; 9 Ohio, 287; 3 Pet. 377; *Ingliss v. The Sailor's Snug Harbor*, 3 Pet. 99; *Moore's heirs v. Moore's devisees*, 4 Dana, 355; 1 Story's Eq. 415; *De Clerg v. Gallipolis*, 7 Ohio, 221; *Bryant, Thorhill et al. v. McCandless*, 7 Ohio, 135.

Lowe & Boothe, for John Q. Urmey

Haynes & Howard, for the heirs at law. 2 Story's Eq. 243, sec. 979; *Morris v. The Bishop of Durham*, 9 Vesey, 399; 10 Id. 622; *Fowler v. Garlike*, 4 Cond. Eng. Ch. 403; *Vesey v. Jameson*, 11 Id. 36; *Ommaney v. Butcher*, 11 Id. 145; 2 Story's Eq. 389; *Acroyd v. Smithson*, 2 Bro. Ch. 503; *Robinson v. Taylor*, 2 Id. 589; *Hutcherson v. Hammond*, 3 Id. 128; *Chitty v. Parker*, 4 Id. 411; *Berry v. Usher*, 11 Vesey, 87; *Gibbs v. Augier*, 12 Id. 413; *Hooper v. Godwin*, 18 Id. 156; 1 Vesey, 271; 2 Id. 686; *Burr v. Sim*, 1 Wheat. 252; *Craig v. Leslie*, 3 Id. 563; *Wood v. Cone*, 7 Paige, 472; *Wood v. Keys*, 8 Id. 365; *Smith v. McCleary*, 3 Irad. 204; *Bogart v. Hertel*, 4 Hill. 482; *Commonwealth v. Martin*, 5 Munf. 117; *Fitch v. 163]* *Weber*, 6 Hare, *145; *White & Tudor*, Lead. Eq. Cas. 587; *Samwell v. Wake*, 1 Bro. Ch. 144; *Hauley v. James*, 6 Paige, 318; 2 Vesey, 271.

Henry Stanbery, for Wooden and wife. *Acroyd v. Smithson*, 2 Bro. Ch. 503; 1 *White & Tudor*, Lead. Eq. Cas. 595, and cases there collected.

RANNEY, J. Four separate claims are made in this case to the fund brought into court by the executors of Urmey. It is claimed by the trustees of Jefferson and Madison townships, for the poor of those townships, under the provisions of the will; the widow claims it as next of kin; the brothers and sisters of Urmey as his heirs at law, he having left no legitimate child; and lastly, John Q. Urmey, his illegitimate son. The claim of the trustees is based upon the residuary clause in the will of Urmey, which is in these words: "The remainder of my estate I do hereby give and devise to the poor and needy, fatherless, etc., of Jefferson and Madison townships, of the county aforesaid; to such poor as are not able to support themselves, to be divided as my executors may deem proper without any partiality." It is contended by them that this is a valid legal bequest for a legal, charitable, and meritorious object. This claim is resisted by all the other parties, and the bequest

is claimed to be "utterly uncertain and indefinite as to the objects of the bequest, and, therefore, void." If this bequest can be sustained, it disposes of the whole fund, and renders it unnecessary to consider the conflicting claims of the other parties; and we are all of opinion that it is not of a character to require or authorize us to defeat the intention of the testator. Although the jurisdiction of courts of chancery over charitable bequests of this character has been the subject of much controversy, it seems to have been always agreed, from an early period in the Roman law to the present time, that such gifts are to receive a most liberal construction. 2 Story's Eq. sec. 1139; 17 Serg. & Rawle, 88; 9 Ohio, 287; 20 Ohio, 483.

*Whatever might have been the course pursued by the courts [164 of chancery in England prior to the passage of the statute of Charitable Uses, 43d of Elizabeth, which I do not propose to examine, it is unmistakably clear that since that time their whole jurisdiction has been regarded as resting upon it, and they have uniformly refused to interfere in cases not falling within its provisions. That statute has been construed with almost extravagant liberality, and it is not doubted that this case would fall within its provisions; but inasmuch as that statute is not in force here, it is hence inferred that our courts are invested with no such power. This consequence by no means follows. On the contrary, many of its principles have been long since incorporated into American jurisprudence, and enforced by the decisions of the highest and most enlightened courts. These decisions very conclusively settle the case under consideration. In the case of *Witman v. Lex*, 17 Serg. & Rawle, 88, the bequest was of a sum of money to two churches to lay out the interest annually in bread for the poor of the congregation. This bequest was sustained by Chief Justice Gibson in a very masterly opinion covering the whole ground. He arrived at the conclusion that it was immaterial whether the persons to take were in *esse* or not, or whether the church was then a corporation or not, or how uncertain the objects might be, provided there was a discretionary power vested anywhere over the application of the testator's bounty to the objects intended—that if the intention sufficiently appeared in the bequest, it would be held valid. These principles were also enforced by the supreme court of the United States in the case of *Ingliss v. The Sailors' Snug Harbor*, 3 Pet. 99, in which a bequest to the chancellor of New York, and others, in trust, to erect an asylum for the purpose

of supporting aged, decrepid, and worn out sailors, was sustained; see also to the same purport, *Moore's Heirs v. Moore's Devises*, 4 Dana, 355.

Our own court, in the case of *The Trustees of the McIntyre Poor 165] School v. The Zanesville Canal & Manufacturing Co.*, 9 *Ohio, 287, have been no less explicit. The devise in that case was for the purpose of establishing a school for poor children within the town of Zanesville. This devise was claimed to be void for uncertainty as to the objects intended to be benefited. But the court sustained it, and remark that "where a trust is plainly defined and a trustee exist capable of holding the property and executing the trust, it has never been doubted that chancery has jurisdiction over it by its own inherent authority."

In this case, the property is by the will expressly vested in the executors, and they are made trustees to apply the fund from time to time to relieve the necessities of the poor and needy in the townships named. The trustees exist to take and hold the property, and they are charged to seek out and apply it to the objects of the testator's bounty. These objects are as clearly pointed out as the nature of the case will admit, and as little as possible left to the discretion of his trustees.

But if we were in doubt as to the doctrines of the adjudged cases, we certainly could not err in the light of our own legislation. By the 13th section of the act for the relief of the poor, passed in 1831, it is provided:

"That all gifts, grants, devises, and bequests hereafter to be made of any houses, lands, tenements, rents, goods, chattels, sum or sums of money to the poor of any township by deed, gift, or by the last will and testament of any person or persons, or otherwise, shall be good and valid in law; and shall pass such houses, lands, tenements, rents, goods, and chattels to the trustees of such townships and their successors in office, for the use of their poor respectively, under such regulations as shall from time to time be made by law." Swan's Stat. 637.

These provisions have been upon our statutes substantially since 1795. It can not be doubted that if this bequest had been made *directly* to the poor of the townships named, it would have taken effect under this section, and vested the property in the trustees of 166] those townships in trust for the *use of the poor. To prevent a failure of these charitable bequests, the statute has designated a

trustee where none is named to hold and apply the fund. Just what the statute has done in such case the testator has himself done in this. It does not need, therefore, the aid of the statute. But it would certainly present a strange anomaly for the legislature to provide that the least certain of these bequests should "be good and valid in law," and this court at the same time held the more certain "utterly void." Wherever the spirit and policy of our legislation leads, the judicial tribunals are bound to follow; and we think this consideration alone entirely decisive of this case.

It is suggested that the trustees in this case should be changed. The papers present no reason why this court should interfere with the appointment made by the testator himself. If, for any reason hereafter, the trust shall not be faithfully executed, the court of chancery in the county will possess full power to remedy the defect so as to carry into full effect the intention of the testator; for no trust can fail for the want of a trustee.

A decree can be taken upon these principles.

JOHN CONNER v. DAVID DRAKE.

A court of chancery will not decree a specific performance of an agreement to arbitrate, nor will it require arbitrators to make an award.

Parties, by agreement, can not change the mode of proceeding in the trial of a cause in court; but each party has a right to demand that the cause shall be tried in the ordinary way, although he may previously have entered into an agreement that certain questions arising in the controversy should be submitted to arbitration.

Where a question of damages arises it is not error in the court, by the consent of both parties, to permit the amount to be fixed by arbitrators, and to decree the amount thus found.

*The propriety of permitting a complainant to dismiss his bill without [167] prejudice rests in the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well defendant as complainant.

BILL of review reserved in the district court in Holmes county.
Hoagland and Gilbert, for complainant.
Sapp and Welker, for defendant.

Conner v. Drake.

CALDWELL, C. J. This is a bill of review from the county of Holmes. The plaintiff contends that error has intervened in a decree rendered by the common pleas of Holmes county, in a cause wherein he was complainant, and alleges errors of law, as well as errors of fact. The controversy arose between the parties in reference to a mill-dam erected by the complainant, Conner, which it was claimed damaged Drake, by causing the water to overflow his lands. Some time in 1839, Drake commenced an action against Conner for this injury, and recovered a judgment in the court of common pleas. The case was appealed to the supreme court, and whilst it was pending in that court, the parties agreed to compromise all difficulties. They entered into a written agreement, by which it was provided that Drake should dismiss his suit, that he should relinquish all claims against Conner, for future damages on his land, and that Conner should, on his part, pay to Drake, double the amount of all damage that had accrued, or might accrue to him, Drake, on account of the erection and continuance of said mill-dam. It was further agreed in said contract that these damages should be assessed by three arbitrators, two of whom should be chosen by the parties and the third selected by the two others thus chosen.

The suit in the supreme court was dismissed according to the terms of the agreement, but nothing further being done to complete the contract, the complainant in review, Conner, filed his bill for a [168] specific performance of the contract. The bill sets forth the contract and alleges that the complainant had appointed an arbitrator, but that Drake had neglected to make any appointment; states that Drake had commenced another suit for damages, on account of the mill-dam, and prays that the agreement of compromise be specifically performed, and that Drake be enjoined from proceeding further in his suit at law. Drake answered, admitting all, or most of the material allegations of the bill. Arbitrators were chosen according to the terms of the contract. The court decreed a specific performance of the contract, and ordered that Daniel Leadbetter be appointed a special master to act in taking testimony before the arbitrators, who proceeded to hear the testimony. Two awards of the arbitrators were set aside as having been improperly obtained. The arbitrators returned a third award which found the damages to be \$250. The complainant objected to this award, and moved the court to set it aside on the ground that it had been ob-

tained by fraud. The court overruled this objection. The complainant then moved to dismiss his bill without prejudice, which motion the court also overruled, and then proceeded to decree a specific performance, by requiring Drake to execute to Conner a conveyance of the easement on the land, and requiring Conner to pay to Drake the amount of the award in accordance with the terms of the written contract.

The principal error assigned is, that the court have not jurisdiction to proceed to determine the amount of damages by arbitration under the superintendence of a master.

It is a well settled principle of equity jurisprudence, that a court of equity will not force the specific performance of an agreement, to refer any matter in controversy between adverse parties to arbitrators. Nor will they compel arbitrators to make an award. This doctrine is stated in 2 Story on Equity, 680. This principle was directly decided in the case of *Mitchell v. Harris*, 2 Ves. jr. 131, and in *Street v. Rigby*, 6 Ves. 817. The reason given for this rule is, that courts of chancery will not aid parties in ousting, by *their [169] agreements the jurisdiction of the ordinary tribunals of the country established for the trial of causes. Nor will they permit parties, by agreement, to change their mode of proceeding. Now, if this bill had been filed simply for the purpose of enforcing an agreement to arbitrate, it would have been clearly erroneous for the court to have entertained jurisdiction. But this agreement was one for the conveyance of an interest in real estate, to decree the performance of which requires the aid of a court of chancery and comes within its peculiar province. Fixing the amount to be paid as the consideration for the conveyance followed rather as a consequence of its enforcement. Now, although the proceeding of arbitrators under the direction of a master to ascertain damages is a novel one in a court of chancery, yet when, as in this case, the parties are satisfied that the assessment should be made in this way, we do not think it can afterwards be assigned for error.

Although the complainant objected to the entering of the award, yet no objection, even then, was taken to the manner of assessing the damages; the objection taken was that it had been obtained by fraud.

The agreement of the parties could be substantially carried into effect without requiring the damages to be assessed by arbitrators; that was only a means of arriving at a result which might be

reached in another way. The court was not bound to adopt this mode of making the assessment, nor after the award had been made was the court bound to carry its finding into decree; the court could set it aside just as they could the report of a master or the verdict of a jury in an issue out of chancery. So with the parties, although they had agreed that this matter of controversy should be settled by arbitration. When they had submitted it to a court, neither party was bound to arbitrate; but either might claim that the case should be tried and determined in the ordinary mode of judicial proceeding. The parties might, however, have agreed on the amount to be entered in the decree, and if the court had [170] taken such amount and decreed on it, no objection could have been taken. In this instance, the parties, whilst the case was in progress in court, having agreed that the damages should be fixed by three men, and upon the return of the award, having taken no exception to the mode of finding it, must be held to have waived all exceptions on that ground.

Under these circumstances it would at least be necessary that the party alleging error should be able to show that the amount thus found was not the true one; nothing of that kind is attempted.

But it is alleged for error that the court refused, on the coming in of the award, to permit the complainant to dismiss his bill. The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both the parties, as well the defendant as the complainant. After a defendant has been put to trouble and expense in making his defense, if, in the progress of the case rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them, merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the court as well as with the rights of defendants. We think the court did not err in this ruling.

It is also assigned for error that the court refused to set aside the award on the affidavit of George Liger, one of the arbitrators who stated in his affidavit that when he agreed to the award he supposed that the sum of \$250 returned by him and the other arbitrators, was the full amount which the court would decree.

The written agreement of the parties was that the damages

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should be doubled. Liger says that he considered the actual damage \$100, but as a compromise he agreed to place it at \$125, and that he supposed the return which they made of \$250 was doubling the amount of their finding. It is to be observed that he signed the award, placing the damages *at \$250, the other two ar- [171] bitrators still adhere, so far as we have evidence, to that finding which leaves the reasonable presumption in its favor.

If the court decreed the right amount we can not say they erred, although one of the arbitrators may think it incorrect. As we have not the evidence in the case we can not say that the decree of the court was for too large a sum.

The other errors assigned are predicated on newly-discovered evidence. Our statute relating to bills of review requires that a bill on the ground of newly-discovered evidence shall be filed on leave of court. No such leave has been granted in this case, and we can not therefore consider these assignments.

On an examination of the whole case we do not discover any error in the decree of the court of common pleas. The bill of review will therefore be dismissed.

BARTLEY, J., dissented.

Bill dismissed.

H. N. HUBBLE, FOR THE USE OF THE CENTRAL COLLEGE OF OHIO, v.
JONATHAN RENICK, ADM'R OF THE ESTATE OF GEORGE BURNS,
DECEASED.

The law making it is the duty of the court of common pleas, at the time of the rendition of the judgment or decree in certain cases, to ascertain and fix the penalty of the appeal bond to be given in the event of an appeal, requires this act to be performed by that court without the motion of either party in the cause.

The omission of the court of common pleas to do this act will not deprive a party of his appeal when he has, by giving notice and executing an appeal bond, done all upon his own part which the law requires to entitle him to the appeal.

In case of this omission by the common pleas, the appellant should give his bond with security to the approval of the clerk of the court or one of the judges thereof. And if the appeal bond should be found insufficient or defective, the district court can order another bond to be given.

A motion to dismiss an appeal will be in time if made during the term at which the appeal is entered and before judgment.

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172] *Where the parties have waived the intervention of a jury, and submitted the trial of a civil cause upon its merits to the judges of the district court, the facts should be found by the court or ascertained by an agreed statement between the parties before the case can be regularly reserved for decision by this court on the legal questions arising upon the merits.

RESERVED in the district court in Pickaway county for decision in the supreme court.

Galloway & Page, attorneys for plaintiff.

Jonathan Renick, attorney for defendant.

BARTLEY, J., delivered the opinion of the court.

This was an action of debt instituted in the court of common pleas of Pickaway county, which at the August term, 1852, of said court was tried on the issue joined, and a judgment rendered against the plaintiff for costs; whereupon the plaintiff gave notice of his intention to appeal the cause to the district court. But the court of common pleas did not at the time of the rendition of the judgment, or at any other time, ascertain and fix the penalty of the appeal bond to be given in the event of an appeal, as required by the third section of the act regulating appeals to the district court. The plaintiff within the time provided by law gave bond for the appeal in due form, with sufficient surety to the approval of the clerk of the court in the penal sum of fifty dollars.

At the October term, 1852, of the district court of said county, the cause having been brought into that court at that term, came on for trial, and the parties waiving a jury submitted the cause to the court for trial on the merits. And the evidence on both sides having been closed, the plaintiff made his opening argument; whereupon the defendant moved the court to quash the appeal, on the ground that the penalty of the appeal bond was not fixed by the court of common pleas; which motion was resisted by the plaintiff, who moved the court to order a new appeal bond to be given in case the court should be of opinion that the exception was well taken and made in due time, and the questions aforesaid, as 173] well as those arising upon the merits of the *case, being important, the cause was, on motion of the plaintiff, reserved for decision by this court.

Several questions of practice are presented in this case. The first in order is whether it was an essential requisite to entitle the party to an appeal to the district court, that the court of original

jurisdiction should ascertain and fix the penalty of the appeal bond.

The law regulating appeals to the district court confers the right of appeal and prescribes the terms on which a party may exercise it. Two things only are required of the party desiring to appeal his cause. First, that he enter upon the records of the court notice of his intention to appeal at the term of the court at which the judgment or decree was rendered. Second, that within thirty days after the rising of the court, he give bond with security to the approval of the clerk of the court or any judge thereof, in the penalty and with the condition provided by the law. The third section of the law, besides prescribing the terms and conditions of the appeal bond, provides as follows:

"In all cases in which the judgment or decree is personal against any party for the payment of money only, the penalty of the appeal bond shall be double the amount of such judgment or decree; in all other cases, including cases in which the judgment or decree is against any party for nominal damages and costs, or for costs only, *the court shall, at the time of the rendition of the judgment or decree*, ascertain and fix the penalty of the appeal bond to be given in the event of an appeal, at such reasonable amount as shall in the opinion of the court be sufficient to cover any probable loss, damage, or injury which the other party or parties may sustain by the delay, and the costs and damages which may be awarded in the appellate court."

This law is remedial in its nature and must receive a liberal construction. To ascertain and fix the penalty of the appeal bond is made the imperative duty of the court, at the time of the rendition of the judgment or decree and in anticipation of the event of an appeal. This act of the court is not in *strict compliance* with the statute, if done at any time after the rendition of the judgment or decree, although at the same term. It would seem to be a requisite part of the entry to accompany the judgment or decree, and therefore in its order precedes any notice of appeal, if the language of the law is to be observed. The express terms of the law therefore forbid the idea that this act of the court is to be done on the motion of the appellant.

Shall a party, then, be deprived of his appeal on account of an inadvertence or omission of duty on the part of the court when he has done all on his own part which the law required to entitle him

to it? A majority of this court are clearly of the opinion that the right of appeal can not be taken away upon this ground, without a manifest violation of the reasonable intention of the law. A different construction would place it in the power of the court from which the appeal is sought, to deprive a party of his right of appeal, either by neglect or by arbitrary omission.

Some of the decisions of the late supreme court, giving a construction to the statutes regulating appeals from the common pleas to the supreme court, may, from analogy, seem to be at variance with the decision of this case. The decisions of that court, however, on the subject of appeals, were not always uniform, and were made under peculiar circumstances. Under the judiciary system of the old constitution, the judges of the supreme court finding it impracticable to dispose of all the business which came into the supreme court on the circuit, set their faces against appeals, and gave a construction to the statutes regulating appeals sometimes even more stringent than would be applicable to statutes highly penal, or statutes in derogation of natural rights. In the case of *Moore v. Brown*, 10 Ohio, 197, it was held that, although the appellant had given notice of appeal, which was entered by the court on its docket or minutes, yet, because the clerk had inadvertently or negligently omitted to carry the same into the journal, the appeal must be dismissed; and that the defect could not be cured by a *nunc pro tunc* order at the subsequent term.

So rigid a rule of construction would not seem to be applicable to laws remedial in their nature. Mr. Smith, in his commentaries on statutory construction, sec. 547, lays down the rule as follows: 175] * "A remedial act should be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy; and, as a general rule, a remedial statute ought to be construed liberally, receiving an equitable or rather a benignant interpretation; the letter of the act will be sometimes enlarged, sometimes restrained, and sometimes it has been said the construction made is contrary to the letter." Dwarries, 718.

The reason of a law, the purpose provided for, and the intention of the law-making power, are all to be considered in the interpretation of the law. Lord Mansfield says, 1 Burr. 447, "*There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament, and clauses merely directory.*" Where an act is of the essence of the thing required by

a law, or, in other words, where it is essential to accomplish the object and intent of the law, it is imperative and can not be dispensed with ; but otherwise, it may be merely directory. It was the object and intent of the law regulating appeals, to provide security to the appellee. It was therefore essential that the appellant should give bond with surety, to entitle him to the appeal. This was indispensable for the appellee's security. But the *mode* by which the penalty or amount of the bond should be prescribed or fixed, whether by an order of court or by the clerk, or otherwise, was not of the essence of the thing. A bond for sufficient amount might be given without an order of the court fixing it. In this, therefore, the law is merely *directory* ; and when the appellant has done all which the law required of him to entitle himself to an appeal, it could not have been the intention of the legislature to place it in the power of the court, from whose judgment he seeks to appeal, to deprive him of this right, by an omission either through negligence or design to perform an act in regard to which the law is merely directory. .

It is the opinion of a majority of this court, that where the common pleas has omitted to fix the penalty of the appeal bond, the appellant should give his bond, with security, to the clerk of the court, or one of the judges thereof. If the penalty of the bond should be found insufficient in amount, or the bond *otherwise* [176 defective, either in the form or in the conditions thereof, the district court can order another bond to be given.

Did the exception to the appeal in this case come too late? The act of March 9, 1835, amendatory to the act to regulate the practice of judicial courts, provides that a failure to take the exceptions at a term in which the appeal is entered shall be considered a waiver of exceptions to such appeal. Swan's Stat. 686. After judgment, a party would be precluded from taking such exception ; but at any time during the first term at which the appeal is entered, and before judgment, the exception would be in time.

This cause was reserved also for the determination of important questions by this court arising upon the merits on an issue of fact. Before the legal questions arising upon the merits can be properly presented to this court, the facts should be found or presented on an agreed statement between the parties. When the parties in this case waived the intervention of a jury, and agreed to submit the trial of the cause upon its merits to the judges of the district court,

that court could not properly, upon the motion of one of the parties, change the tribunal and transfer the cause to this court for the determination of the issue of fact. And as it would be very difficult, if not impossible, to determine the legal questions arising on the merits, without first finding the facts, the cause must be remanded.

The motion to dismiss the appeal, therefore, is overruled, and the cause remanded to the district court for trial upon the merits.

THURMAN, J. I am unable to concur in the opinion just pronounced. I think the motion of the appellant, for leave to file a new bond, ought to be granted; and that, in default of his giving such bond, the motion of the appellee to dismiss the appeal ought to be sustained. In order to explain my views, it is necessary to review in some detail our legislation and decisions upon the subject of appeals. Prior to the act of March 9, 1835, Swan's Stat. 177] 686, it was uniformly *decided that a strict compliance with the conditions upon which an appeal was allowed was necessary to give the appellate court jurisdiction. No matter by whose fault or negligence the error or omission occurred, if the statute had not complied with the appeal was dismissed. For, the jurisdiction depending on compliance, a default, however occurring, could not be waived or overlooked. Thus, in *Wilson v. Holeman*, 2 Ohio, 253, in which the appeal was dismissed upon two grounds, one of them was that the bond did not set out the suit with sufficient precision to determine with certainty to what case it was intended to apply. The court, in sustaining this exception, said: "As this suit, therefore, is not within the original jurisdiction of this court, and the steps required in order to give us appellate jurisdiction have not been taken, the appeal must be dismissed."

In *Oliver v. Pray*, 4 Ohio, 175, it was held that an appeal was properly dismissed when the appeal bond was in double the amount of the judgment, exclusive of costs. No question was made but that the penalty of the bond was sufficient to protect the adverse party. But the fatal objection was that the law had not been complied with, and, therefore, the appellate court had no jurisdiction. The statute required the penalty to be double the amount of the judgment, including costs. A bond in a less amount could not be of any avail. Now, it is to be especially noted that the defect in the bond occurred, in the opinion of the court, from no negligence

or fault of the party giving it; for it is expressly declared that no fault or negligence could be imputed to him, and that he acted "with good faith, and with all reasonable diligence." The error was "occasioned by the mistake or oversight of the clerk." So the court distinctly held, and yet the appeal was dismissed, and the party driven to a court of equity to get a new trial. I dwell on this, because in the present case great stress is laid on the argument that the omission to fix the penalty of the bond was a fault of the common pleas, and not of the appellant. *I do not [178 so consider it; but if it were so, I do not see how the appellant is aided by it. But of this hereafter.

In the case just cited the court said: "On motion of the respondent, the supreme court quashed the appeal upon the ground that the bond was not executed in conformity with the provisions of the statute. The amount of the penalty was supposed to be matter of positive law, and one of the requisites upon which the appellate jurisdiction of the court depends. To effect an appeal the provisions of the statute no doubt must be substantially complied with. It can not be done without the notice is entered of record at the term in which the judgment or decree was rendered. So the appeal must fail if the bond should not be executed within the time prescribed by the act, and it has been several times decided that the penalty of the bond must be double the amount of the judgment or decree, including the costs. The party has his right of appeal upon complying with the conditions annexed by the statute. His right is lost by omitting or neglecting to perform any of the conditions, and the appellate jurisdiction of this court altogether ceases over the cause. With regard to notice and filing the bond within thirty days after the rising of the court, the decisions have been uniform that the omission in either case ousts this court of its jurisdiction. It is undoubtedly within the powers of the legislature to attach all reasonable conditions to the right of appeal, and thus place a limitation upon the appellate jurisdiction of the court. The cause is not appealed without the party performs the conditions required by statute; and when he neglects to do so, to entertain jurisdiction would be mere usurpation of power."

The same point, to wit, that a bond in less than double the amount of the debt and costs, would not sustain an appeal, was again decided in *Bliss v. Long*, 5 Ohio, 276. The objection was not taken until after the jury had been sworn and part of the testi-

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mony given in the appellate court; yet, as it went to the jurisdiction, it was not deemed too late. The force of the decision is not **179]** weakened by the *fact that the cause was subsequently reinstated on the docket, it being shown to the court that an error had occurred in taxing the costs below, and that the penalty of the bond was in truth large enough.

In *Torbet v. Coffin*, 6 Ohio, 33, the facts were these: Coffin recovered judgment against Torbet before a justice. Torbet in due time gave security for an appeal. At the second term of the common pleas thereafter, he asked leave to docket the appeal and proved that the omission to docket it at the first term was in consequence of an agreement with the plaintiff that if it was not docketed he would discontinue the suit or cancel the judgment. The court allowed it to be docketed; the parties filed pleadings, made up an issue, and went to trial, and a verdict and judgment were given for the defendant. The supreme court reversed the judgment upon the ground that the common pleas had no jurisdiction of the case, the appeal not having been docketed at the first term.

These several rulings were approved in *Bradley v. Sneath*, 6 Ohio, 490, in which it was held that, "if upon appeal from the common pleas to the supreme court, no bond is taken, the jurisdiction of the supreme court does not attach, and exception may be taken by the appellee after trial and verdict against him." A compliance with the requisitions of the statute, said the court, was necessary to vacate the judgment of the court of common pleas, and, unless it were vacated, the jurisdiction of the supreme court could not attach.

So stood the law when the before-mentioned statute of 1835 was enacted. The appellate court had no jurisdiction in the absence of any of the pre-requisites prescribed by the statute. It was of no importance whose fault or negligence it was that occasioned the defect, whether it was the appellant's own default, or, as in *Oliver v. Pray*, the clerk's; or, as in *Torbet v. Coffin*, the result of the bad faith of the appellee; the defect, if it existed at all, was fatal. For positive statute law required certain conditions precedent to the existence of the jurisdiction, and it was not the province of the **180]** *court to alter or modify that law. But the act of 1835 made an important change. By its fourth section it provided:

"That no exception to an appeal bond, in any case removed by

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appeal from a justice of the peace to the court of common pleas, or from the court of common pleas to the supreme court, shall be taken, unless the same be done at the term of the court in which the appeal is entered; and the failure to take such exceptions at that time shall be considered as a waiver of all exceptions. And if, upon exception taken, the bond shall be found to be defective, either in form or in any other respect, the appellate court may order a new bond to be given, with security to the satisfaction of the clerk of said court; and if such new bond be given according to said order, said appeal shall not be dismissed, but the appellate court shall proceed to hear and determine the cause in the same manner as if the bond originally given had been sufficient; provided, that nothing in this section contained shall be construed to extend to bonds not executed within the time limited by law for giving appeal bonds." Swan's Stat. 686.

The effect of this statute was to confer jurisdiction upon the appellate court, although the appeal bond might be defective, provided that no objection was made at the first term, or, if then made, that a new and sufficient bond was given. But it was not designed to give validity and sufficiency to a bond not executed in compliance with the law. On the contrary, the appellee's right to except to such a bond and to ask that the appeal be dismissed, is carefully preserved, limited only as to the time within which the exception shall be taken, and by the appellant's counter right to give a new bond. The court are authorized to order the new bond, "and if such new bond be given according to said order," says the statute, "said appeal shall not be dismissed, but the appellate court shall proceed to hear and determine the cause in the same manner as if the bond originally given had been sufficient." It is only upon the giving of such new bond that the court is empowered to proceed. Before the statute, it could not proceed at all. It had no jurisdiction *and a valid objection to jurisdiction could not [181 be waived. But the statute came and authorized it to be waived, and enacted that it should be considered as waived if not made at the first term, and that if then made it might be obviated by a new bond. That being given, the jurisdiction becomes as complete as if the original bond had been sufficient. But that not being given, and the exception being taken in time, the appeal must be dismissed. Such, I understood to be the meaning of the law.

In *Hays v. Armstrong*, 7 Ohio, pt. 1, 247, a retrospective oper-

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ation was given to this act, and an exception to a bond was considered as too late, because not taken at the first term, although the statute was not enacted until after that term.

In *Saterlee v. Stevens*, 11 Ohio, 420, the bond was defective and the objection made in time. The court did just what I think should be done in the present case. They required the appellee to give a bond.

That the same strictness established by these repeated decisions yet obtains in cases to which the act of 1835, does not apply, will be seen by reference to *Moore v. Brown*, 10 Ohio, 197, and *Landon v. Reed*, *idem*, 502. In the first of these cases, it was held that a notice of appeal, marked by the court on its docket but not carried into the journal, is not a compliance with the statute requiring such notice to be entered on the record; nor can the omission be cured by a *nunc pro tunc* order at a subsequent term. In the latter case it was decided that where a *nunc pro tunc* judgment was entered in the common pleas, at July term, to take effect as of the April term preceding, an appeal bond filed within thirty days after the July term was not within time. And in both cases the appeals were quashed.

The conditions on which appeals may be taken to the district court are prescribed by statute, 50 Ohio L. 93. The second section of the act provides that the parties desirous of appealing, shall, at the term of the court in which the judgment or decree is rendered, 182] enter on the records of the court *notice of such intention, and shall, within thirty days after the rising of the court, give bond, with one or more sufficient sureties to be approved by the clerk of the court, or any judge thereof, in the penalty and with the condition hereinafter provided. The third section prescribes the penalty and condition of the bond, and to whom it shall be payable. In respect to the penalty, the provisions are that it shall be in double the amount of the judgment or decree, where that is for the payment of money only, and that in all other cases, including cases in which the judgment or decree is for nominal damages and costs, or for costs only, "the court shall, at the time of the rendition of the judgment or decree, ascertain and fix the penalty of the appeal bond, to be given in the event of an appeal, at such reasonable amount as shall in the opinion of the court be sufficient to cover any probable loss, damage, or injury, which the other party or par-

ties, may sustain by the delay, and the costs and damages which may be awarded in the appellate court."

The case before us is undeniably one in which the appeal bond should be in a penalty fixed by the court. But no such bond was given. Owing to some cause unknown to us, probably to the fact that the statute had not been published, the court fixed no penalty. The appellant fixed it himself when he gave the bond, or the clerk did so. In either event the bond is not a compliance with the law, and I know of no power possessed by any court, to allow a substitute for what a statute positively requires; what causes may be appealed, and upon what terms, it is for the legislature to say, and when it has spoken, the courts must obey. If, owing to omissions, or unwise enactments, in the law, or to their late publication, cases of hardship arise, the fault, if there is one, is not the fault of the courts, nor is it any part of their province to provide remedies for such evils. Many cases, no doubt, would have been appealed, which have not been, had the law been known throughout the state in time. But not being known, notice of appeal was not entered on the record, and the right of appeal was lost. For it is not pretended *that in such a case there could be an appeal, even [183 had the party seeking it given the most ample bond. And yet he would have been quite as diligent as was the appellant in this case, and would have quite as meritorious a cause. It will not do, it seems to me, to say that the omission to fix the penalty was the default of the court. Suppose it were so, how could that make a bond valid that is not in compliance with the statute? How could that authorize a substitute for what is required by the statute as a condition precedent to an appeal? We have seen that, in *Oliver v. Pray*, the appellant had used all due diligence, and the error was by the fault of the clerk, yet the appeal was dismissed. And in *Torbet v. Coffin*, the omission was procured by the appellee, yet it was held fatal. For the question in a court of law is not whether there has been diligence or negligence, but whether the statute has been complied with. It is only upon compliance that an appeal is authorized, and therefore the fact of compliance, or non-compliance, settles the rights of the parties. So it was uniformly held, under former laws, as the cases cited fully show, and there is nothing in the existing statute to alter the rule of decision.

But were it otherwise, I wholly dissent from the proposition that the omission to fix the penalty was the default of the court. It is

said that this must be so, because the statute provides that, "the court shall, at the time of the rendition of the judgment or decree, ascertain and fix the penalty of the appeal bond, to be given in the event of an appeal." A very narrow construction is given to the word "time," which restricts it to the instant of the rendition of the judgment. I do not think this the true construction. The whole term is, for certain purposes, regarded as but one day, and I have no idea that an order fixing the penalty would be held nugatory if made subsequent to the rendition of the judgment, but at the same term. Be this, however, as it may, neither construction has anything to do with the question, whether the court is *sua sponte* to fix the penalty, or whether it is only called upon to act when the [184] party desirous of an appeal asks it so to do. Nor are the terms of the statute so imperative, in my judgment, as to require the court to fix a penalty in every case, whether there is an intention to appeal or not. I suppose that it is where only notice of appeal is given that a penalty must be fixed; and as the giving of this notice is the act of the party, and requires no judicial action, and as no court, however diligent, can always bear in mind the cases in which it is given, and as the fixing of the penalty is a judicial act requiring judgment and discretion, and both parties are interested in it, it seems to me that the proper course is, for the party seeking an appeal to move the court to fix the penalty, and for the adverse party to have an opportunity to make such reasonable suggestions as may be necessary.

It is said, however, that, under the amendment of March 12, 1845, (43 Ohio L. 125) to the chancery practice act, which amendment provided that the court should, in certain cases, direct the amount and condition of the appeal bond, it was held by the supreme court on the circuit, that a party did not lose his right of appeal by the fact that the penalty was not thus fixed. But no such decision appears to have been made by the court in bank, nor are we referred to any circuit decisions in which it was expressly ruled that the appeal would be sustained, without a new bond being given, under the act of 1835. We have but a vague account of these circuit decisions, for no one of them is reported; and, so far as I can learn, the question whether a new bond was not necessary, was not made. Be this, however, as it may, they are not, although entitled to respect, binding as authority; and I can not surrender my clear convictions to precedents so doubtful and indecisive. The decisions of the court

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in bank, already referred to, afford a firm ground on which to stand, and no circuit rulings that are opposed to them ought to prevail.

In any point of view, then, in which I can regard this case, the motion of the appellee ought to be sustained, unless the act of 1835 is yet in force, and a new bond be given in *pursuance of [185 it. I think it is in force, and that such bond may be given. I am inclined to the opinion that it, and all the other practice acts, were saved by the constitution itself, and made applicable to the existing courts of the proper jurisdiction. But if this is not so, I am clear that it governs the present courts by force of the act of April 30, 1852. 50 Ohio L. 102. If the constitution have not the effect I have supposed, the same result was accomplished by the 18th section of the act organizing the courts (50 Ohio L. 71), and continued by the above mentioned act of April 30, 1852.

I think, therefore, that the appellee's motion for leave to give a new bond should be granted. For, as I have said, I consider the present bond of no validity, and the act of 1835 does not take away the right to except to it. And having been excepted to in time, the appeal can not be saved under that act without a new bond being given. The act provides that if a new bond be given the appeal shall not be dismissed. The converse is true, that if it be not given, the appeal must fail.

I would remark that in the case of Ratcliff v. Beck, W. L. Jour. November, 1852, page 72, cited by counsel, no application was made for leave to give a new bond. Had it been made I have no doubt it would have been granted. But not being made the appeal was dismissed.

WILLIAM C. KIRBY v. THE STATE OF OHIO.

An indictment which charges a bank bill to have been false, forged, altered and counterfeit, is repugnant.

THIS is a writ of error to the common pleas of Guernsey county.

The plaintiff in error was indicted at the November term, 1852, of the common pleas of Guernsey county, under the twenty-second section of the act providing for the punishment of crimes (Swan's Stat. 233.)

186] *The indictment contained two counts; the first charged that the plaintiff in error uttered and published "as true and genuine, to one David Kinkad, a certain false, forged, altered and counterfeit bank note, etc." The second was the same as the first, except that the instrument is described as a bank bill instead of a bank note.

Bills of exceptions were taken on the trial to the admission of testimony, the charge of the court, and the refusal to set aside the verdict, and a number of errors are assigned upon the record; but as the case was decided upon the exception taken to the indictment, it is unnecessary to notice the other points made.

B. S. Cowen & John A. Bingham, for plaintiff in error; 2 Russell on Crimes, 713; Hooper v. Ohio, 4 Ohio, 350; Roscoe Ev. 90-94; 3 Starkie Ev. 1531; Gould's Pl. 164; Archbold's Crim. Pl. 93-101; Rex. v. Cook, 2 East's Pl. Cr. 617; Rex v. Jones, 1 Doug. 300; Pickens v. The State, 6 Ohio, 274; Hart v. The State, 20 Ohio, 49; Rex v. Carter, 2 East's Pl. Cr. 985; United States v. Porter, 3 Day, 283.

Pugh, attorney general, for the state.

CORWIN, J. The plaintiff in error was indicted for uttering a certain "false, forged, altered and counterfeited" bill, purporting to be a bill of the denomination of twenty dollars, issued by the State Bank of Indiana. The indictment was framed upon the twenty-second section of the act "providing for the punishment of crimes," passed March 7, 1835 (Swan's Stat. 233, 234).

Comparing the twenty-ninth section of the act with the twenty-second, it will be found that the legislature had in mind five descriptions of unlawful bank bills:

1. Counterfeit bills; 2. Forged bills; 3. Spurious bills; 4. Altered bills; 5. False bills.

187] *The twenty-second section embraces the first, second, fourth, and fifth of these; the twenty-ninth section embraces the first, second, third, and fifth.

1. A *counterfeit* bill is one printed from a false plate, and not a bill printed legitimately or illegitimately from the genuine plate.

2. A *forged* bill is one to which the signatures of the officers of the bank whence it purports to have been issued are forged or otherwise falsely affixed. It may be a legitimate or an illegitimate

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impression from the genuine plate, or it may be an impression from a counterfeit plate.

3. A *spurious* bill may be a legitimate impression from the genuine plate, but it must have the signatures of persons not the officers of the bank whence it purports to have issued, or else the names of fictitious persons. A spurious bill, also, may be an illegitimate impression from the genuine plate, or an impression from a counterfeit plate, but it must have such signatures or names as we have just indicated. A bill, therefore, may be both counterfeit and forged, or both counterfeit and spurious, but it can not be both forged and spurious.

4. An altered bill can neither be a counterfeit, a forged, nor a spurious bill, according to the twenty-second section. It must be an authentic and genuine bill, legitimately printed from the genuine plate, and truly signed by the officers of the bank, but altered in its denomination or in some other material part.

5. There may be, however, an illegitimate impression from the genuine plate, that is, merely a *false* bill. It may have forged signatures, or the signatures of persons not the officers of the bank, or the names of fictitious persons.

In a larger sense, to be sure, a bill which is counterfeit alone, or counterfeit and forged, or counterfeit and spurious, or forged alone, or spurious alone, might be called a false bill; and an altered bill, in the same general sense, might be called a false bill; but such language is too loose, we think, to be employed in construing a statute for the definition of crimes.

*The indictment charges the bill in question to have been [188 false, forged, altered, and counterfeited, which is plainly a repugnant description. The judgment must therefore be reversed.

Judgment reversed.

RANNEY dissented.

MORTIMER FARRIS v. THE STATE OF OHIO.

A writ of error in a criminal case requires an allowance, and the better opinion seems to be that the jurisdiction is dependent upon its being allowed; and that, therefore, the allowance can not be waived.

But if it could be waived, it is not waived where the record shows no express waiver, and no plea or joinder is filed by the state.

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In such a case the court of errors should quash the writ; and if, instead of so doing, it affirm the judgment of the inferior court, the judgment of affirmance will be reversed because the writ was not allowed. The parties will then stand as if no writ had ever issued.

It is irregular to return the original files in a criminal case instead of a transcript with a writ of error. The statute authorizing the original papers to be sent up relates to civil causes only.

Whether a writ of error in a civil cause issues as of course. Query.

ERROR to the district court of Morrow county.

Finch & Olds, for plaintiff in error.

Pugh, attorney general, for defendant in error.

THURMAN, J. This is a writ of error to the district court of Morrow county. The plaintiff in error was indicted in Morrow common pleas for resisting a constable, found guilty and sentenced. Upon error, the district court affirmed the sentence, with costs. To reverse this judgment of affirmance the present writ is prosecuted. A motion is made by the attorney general to quash the writ because the writ from the district court to the common pleas was not allowed; and this appears to be the fact. The consequence, however, as we suppose, should be, not a dismissal of the present suit, but a reversal of the judgment of the district court. One of the 189] *errors assigned is the affirmance of the judgment of the common pleas, and this assignment is sustained by the fact that the writ to the common pleas had not been allowed. Instead of hearing the case, the district court should have dismissed it. We are not prepared to say that the allowance could be waived. We incline to think it could not. The district court or any judge of the supreme court has power, "*on good cause shown*," to issue writs of error." 50 Ohio L. 69, sec. 13; Curwen's Stat. chap. —, sec. —. Whether by force of other parts of the statute, a writ of error is not a writ of course, in a civil cause, is a question about which there is a diversity of opinion; but there is no question but that in a criminal case the writ must be allowed. The power given to issue it is a power to issue it "*on good cause shown*," and it would seem that the jurisdiction of the court depends upon its being allowed. Be this as it may, however, the record shows no waiver. There was no express waiver, nor was a plea or joinder filed by the state. It is true the parties, by their attorneys, appeared and

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argued the cause ; but, for aught that is shown by the record, the very objection in question may have been insisted on.

It may be said that, if the district court had no jurisdiction, its judgment is a nullity, and there is nothing to reverse. But the cases are numerous of judgments reversed because the courts rendering them lacked jurisdiction. 2 Mass. 35; 11 Mass. 507.

We notice in the record that the cause was heard on the original papers. This was an irregularity. The statute authorizing the original papers to be certified upon error, applies only to civil cases.

The judgment of the district court must be reversed ; and as this is done for the reason above stated without regard to the other points, the parties will stand as if no writ of error to the common pleas had ever issued. It will be time enough to determine whether the common pleas erred when a writ of error shall have been allowed.

Judgment of the district court reversed.

***WILLIAM WILLIAMSON'S ADMINISTRATORS v. GORDIUS A. [190
HALL.**

The contract of a surety upon an injunction bond is within the statute of frauds, and to be strictly construed, and no parol evidence is admissible to add to, vary or contradict it in any of its terms.

A misrecital in the condition of such bond, as to the amount of the judgment enjoined by an injunction bill, may be corrected by the bill, where the injunction bond contains a plain reference to it, upon the principle that that is certain which can be made certain.

Such reference for the purpose of construction, makes the record referred to a part of the bond itself, and where the description and the proceeding described are both before the court, the latter will control the former.

McGovney v. The State, 20 Ohio R. 98, affirmed and distinguished from the present case.

THIS is a writ of error to the common pleas of Franklin county, reserved in the district court in that county.

The action in the court below was debt upon an injunction bond. The plaintiffs show by their declaration that on the 12th November, 1842, the plaintiffs intestate recovered a judgment in the supreme

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court of Fairfield county, against one James Hampson for the sum of \$2,346.06 and costs. Hampson at the same term applied to the court for an injunction to restrain the collection of the judgment for certain equitable reasons in his bill for that purpose set forth, which the court allowed, and ordered him to give bond in the penal sum of \$3,000 conditioned according to law. Hampson then filed his bill and entered into bond with the defendant as his surety in the penal sum named in the order. The condition of the bond, as alleged, is to the effect following:—"after reciting that the said James Hampson had obtained the allowance of an injunction in the supreme court of Fairfield county, in the State of Ohio, to stay all further proceeding upon a judgment obtained in the same supreme court by the said William Williamson against the said James Hampson at the November term thereof, A. D. 1842, *for the sum of \$2,300, (meaning the same judgment at law herein first above referred unto)* and costs of suit until the matter thereof could be heard in 191] equity; that if the said James Hampson *should pay all money and costs due or to become due from him, the said James Hampson, on said judgment at law, and all money and costs which should be decreed against the said James Hampson in case the said injunction should be dissolved, then said obligation should be void, otherwise in full force and virtue in law." The declaration then proceeds to aver that this bond was filed with the clerk, and the writ of injunction issued by which all proceedings upon the judgment were stayed, until the hearing, when the injunction was dissolved and the bill dismissed; and that execution subsequently issued upon the judgment and was returned entirely unsatisfied, for want of property whereon to levy.

To this declaration the defendant filed a general demurrer, which the court of common pleas sustained, and gave judgment for the defendant, to reverse which this writ is prosecuted.

Henry Stanbery & Goddard, for plaintiff in error.

Mistakes in wills. In the name of legatee, corrected by description of the person. 1 Roper on Leg. 131. In description of legatee, corrected by the true name. Id. 134. Mistakes in deeds. 10 Ohio, 316; 4 Mass. 204. In patents. 6 Pet. 330; Id. 345. In bonds. Mistakes in bail bond, in recitals of the names of plaintiffs in suit, corrected by description of their persons. 10 Mass. 21. In forthcoming bond, misrecital of amount of execution corrected by

other terms. 1 Call. 42. They also cited 12 Sm. & M. 514; 3 Id. 544; 10 Id. 347; 4 Little, 7; 10 Ala. 828; 3 Cranch, 235.

Swayne, for defendant in error.

The breach is not within the terms of the condition of the bond. *Ohio v. Medary*, 17 Ohio, 564; 4 Gill. & J. 401; 1 Chitty Pl. 291. Parol evidence can not be let in to aid in making the surety liable. *McGovney v. The State*, 20 Ohio, 93; 1 Greenl. Ev. 318; 4 Cranch, 224. The failure of the principal debtor to pay the particular judgment was a condition precedent. Such condition is *stricti juris*, and must be shown to have been filled to the letter. 7 Coke, *9; 5 Vin. Abr. condition, 145, pl. 27. Such case admits of [192 no compensation or equivalent. *Wells v. Smith*, 2 Eng. Ch. 83; 3 Atk. 330. The principle of estoppel applies. 1 Greenl. Ev. 26; 4 Kent's Com. 261; *Shelly v. Wright*, Mills, 9; 7 J. J. Marsh. 193. If there be a general and particular description, the latter controls. 1 Greenl. Ev. 363. In such case the inapplicable part of description rejected as surplusage. 4 Phil. Ev. 550. Where all the particulars are necessary to identify the thing described, evidence of an intent to embrace a subject-matter not answering to every part of the description is inadmissible. 4 Dev. 373; 8 Wend. 189; 4 Mass. 205; 7 Johns. 224; 3 Murphey, 539.

RANNEY, J., delivered the opinion of the court.

The sufficiency of the declaration is the question here, as it was in the court below; and the argument has allowed us to confine our inquiry to a single point: Does the misrecital in the condition of the bond, as to the amount of the judgment enjoined, necessarily release the surety? We state the question thus because we are unable to see how any other mode of declaring would have placed the plaintiff's case in a better situation. The pleading makes the best of the contract, and if it is not sufficient it is because the contract itself is invalid. It is claimed to be so by the defendant's counsel, and especially the declaration is insisted to be bad: 1st. Because the breach alleged in the declaration is broader than the condition of the bond, covering a different and larger judgment; 2d. because it is an attempt to contradict or change a written contract by parol evidence; 3d. because the bond against the surety is a contract within the statute of frauds, thereby constituting an additional reason why parol evidence can not be let in to charge a surety, he being only liable according to the strict letter

of his contract, and if not so liable he is not liable at all; and 4th. because the failure of Hampson to pay the particular judgment specified in the condition is a condition precedent to the liability of the surety, and both parties are estopped from setting up any other.

193] *These positions have been ably sustained by counsel, and we have no hesitation in yielding them our entire assent. If this declaration is open to either objection it is undoubtedly bad. The applicability of these principles to the case in hand, rather than their abstract correctness, is, therefore, the question before us. The bond described in the declaration is an injunction bond in the penal sum of three thousand dollars, the sum fixed by the court allowing the injunction, and so far as this part of it is concerned, is clear, definite and accurate. It, however, contains a condition of defeasance, which prescribes upon what terms the obligation contained in the penal part may be avoided, to wit: the payment by Hampson of the judgment enjoined in case the injunction should be dissolved. Because the plaintiffs were obliged to aver the issuing and return of an execution upon this judgment, as well as the dissolution of the injunction, they were compelled to spread out this condition of defeasance in their declaration and to assign the breach upon it, which consisted of the non-payment of the judgment described in it. They describe the judgment actually enjoined, as of a given court, date and amount, and aver that the injunction bill so described it accurately; and that the judgment and injunction bill recited in the condition of the bond, referred to and was intended for the same identical judgment therein correctly described; although the recital was erroneous in one particular—the amount of the judgment. The whole question, therefore, turns upon the *sufficiency* of this description as gathered from the bond itself and the records therein referred to. That these records thus referred to may be resorted to in construing the bond, and in fact become a part of the bond itself for that purpose, is too clearly settled to be doubted. As stated by Chief Justice Marshall in *United States v. Maurice*, 2 Brock. 114: "If, instead of specifying the particular purposes for which the money was received, the condition of the bond refers to a paper which does specify those purposes, I know of no principle of reason or of law which varies the obligation of the instrument from what it would be if containing that specification within itself. That is certain which may

be rendered certain, and an undertaking to perform the duties prescribed in a distinct contract, or in a law, or in any other known paper prescribing those duties, is equivalent to an enumeration of those duties in the body of the contract itself." Another rule equally well settled, and not in the least conflicting with any principle contended for by the defendant's counsel, allows extrinsic parol evidence to be given, to give effect to a written instrument by applying it to its proper subject-matter, by proving the circumstances under which it was made, thereby enabling the court to put themselves in the place of the parties, with all the information possessed by them, the better to understand the terms employed in the contract, and to arrive at the intention of the parties. *Hildebrand v. Foglo*, 20 Ohio, 147.

In applying these principles to this case, we find a distinct reference in the condition of the bond to the injunction bill allowed to be filed in Fairfield county; and the averments of the declaration bring distinctly before us the fact that that bill contains an accurate description of the judgment. The bond undertakes to *recite and describe* the object of that bill to be, to enjoin a judgment of a certain specified amount; but the proceeding itself, in effect, brought before us in the same bond, shows the description to be inaccurate. The bond itself thus furnishing the means for its own correction. It seems to us, if there ever was a case for the safe application of the maxim "*id certum est quod certum reddi potest*," it is one thus circumstanced. The statute does not require the bond to contain a particular description of the judgment; it would be all-sufficient to refer to the bill for that purpose, and everything in the recital of this bond as to those particulars could be stricken out, and still it would be certain and sufficient. Is it less certain when the *thing* itself is brought before us because the party has made an unnecessary false *description* of it? Where both are before us, can we violate any principle of the law in correcting the description by the *thing* described? We think not. And in this conclusion [195 we think we are fully sustained by the authorities cited. In the case of *Colburn v. Downs*, 10 Mass. 20, a bail-bond was held good, although the christian names of both the plaintiffs were mistaken from the further description given in the bond, representing them as "of Boston, in the county of Suffolk, merchants and co-partners in trade, jointly negotiating in business, under the firm of Colburn & Gill." In *Scott v. Hornsby*, 1 Call. 35, a forthcoming bond was

enforced by the court of appeals of Virginia, although the amount of the execution was incorrectly stated in the condition. In the case of *Houston v. Belcher*, 12 S. & M. 514, on an attachment bond, the term of the court at which the writ was returnable was mistaken. Mr. Justice Clayton, in delivering the opinion, says: "Was the bond defective? We think not. There was no error in the obligatory part of the bond. *It was in a recital not necessary to the validity of the obligation.*" In *Laidren v. Featherston*, 10 S. & M., on a title bond, the amount stated in the recital differs from the affidavit; but the bond was held good. A like decision was made in *Walker v. Shotwell*, 13 S. & M. 544.

The case of *McGovney v. The State*, 20 Ohio, 93, is claimed to be, in principle, like the present. We have carefully re-examined the case, and are entirely satisfied with the decision; nor do we regard it as in the least conflicting with the views above expressed. That was an executor's bond, and the name of the testator was mistaken. The condition contained no reference whatever to any record or paper by which it could be corrected; and the question was whether parol evidence was admissible for that purpose. The court held that it was not, and recognized the soundness of the rule laid down by Mr. Greenleaf that such a contract might be made out by any writing of the party or even from his correspondence, but that "it must *all* be collected from the writings, verbal testimony not being admissible to supply any defects or omissions in the written evidence." 1 Greenl. Ev. 318. If in this case the attempt were to [196] resort *to such verbal testimony, we should at once say it could not be done. But no such attempt is made; the party is charged upon his bond and the written evidence referred to in it. *All* its terms are thus made out in writing; and all we decide is, that this unnecessary and erroneous description of the injunction proceeding does not preclude us, when we are expressly referred to it in the bond, from looking to it for the truth, nor from giving effect to the truth when thus discovered. This ruling leaves no possibility of fraud, perjury or mistake. The record is as certain as the bond; and both may be clearly identified and subject to no change or uncertainty.

Since the argument of the cause another objection to the declaration has been suggested. It is claimed that the plaintiff should have averred that the bond was approved by the clerk. Without at this time deciding whether such an averment is indispensable,

we are satisfied that it is substantially made in the declaration; at least, so as to be sufficient on general demurrer. It is averred that the bond was executed in pursuance of the order of court, was filed with the clerk, and that thereupon the injunction issued, etc. The statute requires no endorsement of approval, and, if the facts averred existed, it was a sufficient approval.

A majority of the court are of opinion that the judgment should be reversed and the cause remanded.

CORWIN, J. As I am unable to concur with my brethren in the opinion pronounced in this case, it may be proper to indicate the considerations which have led me to a different conclusion. If it were a mere matter of pleading or practice, I should not consider it important to express my dissent; but, in my judgment, this decision goes to the merits of the controversy, and involves rules of construction and adjudication which establish a new and important precedent, and which are worthy of deliberate consideration.

That a surety can only be bound by the letter of his contract, and can not be made liable by implication or construction, is well established by all the authorities, and conceded *in the opin- [197
ion of the court in this case. But it is said that the penal part of the bond *is the contract* for the payment of the money, and that the condition of the bond is no part of the contract to pay, but simply fixes the terms upon which the contract to pay may be defeated.

This looks well enough in theory, for, in truth, the penal part of the bond contains the only express promise to pay money; and if executed by itself, and without condition, would undoubtedly constitute of itself a good cause of action. But the condition of an injunction bond is as material as any other part of the contract, from which the liability of the surety is to be ascertained. A simple unconditional bond for the payment of money is not an injunction bond—it is not such a contract as was signed by the defendant—it is not such a contract as is averred in the declaration. The obligee can not declare upon this contract *without setting out its condition*, and averring that an execution had issued *upon the judgment recited in the condition*, and averring the breach of that condition.

But independently of any consideration of pleading, upon such a bond, and regarding the true character of the contract in a plain practical view, the condition is not only in form and substance

a material part of the contract; but, in fact, the amount of the judgment described in the condition of the bond is the only measure of the *legal* or *equitable* liability of the obligor. The sum specified in the penal part of the bond, only fixes an amount beyond which the liability of the obligor shall not be extended in any event; and the real liability incurred is, not to pay the penalty of the bond absolutely, but that he will make good the default of the judgment debtor, to pay such decree as may be rendered against him, *on account of the judgment specified in the condition of the bond*. And this is the *extent* of his legal liability, whatever may be the penalty named, and by whomsoever, as a matter of pleading, the condition of the bond is brought upon the record.

A court has no authority to presume that a surety in a bond has intended to describe any thing else than what he has described. 198] *And even if such intentions were manifest, it would be an unwarranted exercise of judicial authority to hold a surety liable for having intended to assume a responsibility, which, in point of fact, he had not assumed, and, with reference to which he was under no moral or equitable obligation. The amount of the judgment proposed to be enjoined is the great, if not the only important consideration with a man about to become surety on a bond to enjoin such judgment. It is comparatively unimportant to him to know what court rendered such judgment, or at what term it was rendered, or what was the original cause of action. This liability of the surety being limited to the amount of the original judgment, with accruing interest and costs, the amount of such judgment is of the very essence of his contract. And when a surety has, in express words, in his contract of suretyship, defined and limited the only basis of liability which he is willing to incur, I am at a loss for authority upon which a court will presume, from circumstances which are not only comparatively unimportant, but which would scarcely even attract the attention of such surety, that he meant and intended to, and therefore did adopt another and wholly different basis of liability.

In *Grant v. Naylor*, 4 Cranch, 224, C. J. Marshal, in delivering the opinion of the court, says, "that the letter was *really designed* for John and Jeremiah Naylor (although addressed to John and Joseph Naylor & Co.) *can not be doubted*, but the principles which require that a promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained

by parol testimony, originate in a general and wise policy, which this court can not relax so far as to except from its operation cases within the principle." And again in the same case it is said: "To admit parol proof to make it such a contract, is going farther than courts have ever gone, when the writing is itself the contract, and not evidence of a contract, and when no pre-existing obligation bound the party to enter into it." And so are all the authorities.

*This is not a case for the application of the maxim, "*id* [199 *certum est quod certum reddi potest*," and none of the authorities recognizing that doctrine, which are cited by counsel, and adopted by the court, have, in my judgment, any applicability to the real question in the case; for the very obvious reason, that *the bond is certain of itself*. There is no ambiguity about it. It is upon its face a good bond, and it is useless to inquire whether we may *make certain*, that which is *already* certain. The real question is, whether a bond, clear, unambiguous, certain and explicit—embracing one specific and clearly-defined subject-matter, may, by averment and proof, be applied to another subject-matter, materially different, and with which the matter of the bond has no connection. I maintain that it can not be so applied, and that the cause of action set out in the declaration in this case is unsupported by reason or authority.

But this conclusion is avoided by the court, upon the assumption that the judgment averred in the declaration is correctly described in the bill in chancery, upon which the injunction was allowed; and that by the recital in the condition of the bond, that "injunction had been allowed," etc.—the bill in chancery was so referred to as that the description of the judgment in such bill in chancery, may be adopted, and the particular description of the judgment in the condition of the bond itself may be rejected. To this proposition I am constrained to dissent, for various reasons:

In the first place, there is *no such reference to the bill in chancery*, as to make it descriptive of any thing in the bond. A bill in chancery is nowhere mentioned or referred to *in terms* in any part of the injunction bond. It is true, it does recite that an injunction has been allowed; but whether upon a bill in chancery, or that it had been allowed upon any particular bill in chancery, containing any particular description of a judgment, is not said in the bond. Undoubtedly the bond would have been a good one if it had referred to the bill in chancery for a description of the judgment to be

enjoined, and the judgment described in such bill in chancery, so 200] for *that purpose referred to, would have been as clearly the basis of the liability of the obligor, as though the same judgment were specifically recited in the bond itself. The bond would thus effectually adopt the description of the bill in chancery. But it is not so here; on the contrary, without adopting any other description, or relying upon, or referring to, any other description, the obligor himself, in his own bond, describes specifically the judgment, for the ultimate payment of which he binds himself. And this precludes any other description.

In considering this proposition, it can not be fairly said, "that by the mere recital, an injunction had been allowed," the party adopted, as a part of his contract, the bill in chancery upon which such injunction may have been allowed; and he ought not to be held to such a rule of construction; for he may not know whether such injunction is allowed at all upon a bill in chancery, or upon mere motion. He knows nothing of a bill in chancery; he is not responsible for the truth or falsity of any of its allegations. He does not know what his principal may allege in the proceeding in which he seeks relief, or on what grounds he may maintain himself, or what means of relief he may resort to. He *does know* the extent of the obligation specified in the bond presented to him for signature, and I think he ought to be permitted to know that he shall not be subjected to any liability, except upon the terms and conditions of the bond he signs.

It ought to be a sufficient answer, to say that the bond contains no *express words* of adoption of, or reference to, the bill in chancery which it is averred describes the judgment set up in this declaration. But if this is not sufficient, and if it may be said that such adoption of the bill in chancery may be ascertained by construction, what is the consequence?

The bill in chancery describes a particular judgment, which it seeks to enjoin. An injunction is allowed on said bill in chancery to enjoin the judgment *therein described*. Upon application for the 201] writ, a bond is presented describing *another and a wholly different judgment. Can any one say that the judgment described in the bill in chancery is enjoined, or may be enjoined, by a bond particularly describing and applying to another judgment? Certainly not. A writ of injunction could never properly issue upon such a bond; and if it had so issued by mistake or inadvertence,

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the court would not continue its injunction on such bond ; but, in the absence of a bond applying to the judgment enjoined, would at once dissolve the injunction, so inadvertently issued.

This is not a case of a mere mistake in *one* of several items of description in a bond. According to the declaration, it is *all* mistake. The supreme court did not, at the term mentioned, render such a judgment as is recited in the condition of the bond. The condition of the bond does not apply to the judgment averred in the declaration. It never could have operated to enjoin such judgment. The bond never performed any function—was *inoperative* as to the judgment introduced by averment—was a mere nullity as to everything except the judgment which it recites, and to which, by its terms, it is applicable ; and, unless such a judgment as the bond describes is shown to exist, and the bond has operated upon such judgment, it has not, and never had force or vitality—it is merely void.

Judgment of the common pleas reversed.

M. A. DOUGHERTY FOR USE OF HOCKING VALLEY BANK v. JOHN WALTERS AND OTHERS.

Where the claim of a complainant in a chancery proceeding against several defendants is separate and distinct, so that the case can be tried as to one or more of the defendants without interfering with the rights or liabilities of the other defendants, it is competent for a court of chancery to pass on the case and render a separate decree as to such defendants, and such decree may be appealed from, although the rest of the case may be undisposed of in the court below.

*An appeal of one branch of a case will not bring into the appellate court [202 parties whose cause has not been adjudicated in the court below, although such parties would be necessary in the appellate court to enable it to render a decree.

Where the court of common pleas proceeds to render a decree as to one of several defendants, whose interests are inseparably connected, leaving the case as to such other defendants undisposed of, such decree is, so far as the right of appeal is concerned, a nullity, and can be set aside by the court rendering the decree, at a subsequent term, for irregularity.

MOTION to dismiss an appeal. Reserved in Fairfield county.

Hunter, for the motion.

J. D. & C. D. Martin, contra.

CALDWELL, C.J. This is a bill filed by complainant for the purpose of subjecting certain equities of John Walters, in the hands of the other defendants, to the payment of a judgment which he holds against Walters. The bill, amongst other things, alleges that Walters, in 1850, leased for the term of two years, from the defendant, Ruffner, a large distillery, and that he (Walters) paid the rent in advance. That Walters, shortly after the commencement of the term, left the country, and that Ruffner went immediately into the possession of the distillery, and has had the use and occupancy of it since. And the prayer of the bill is that he account to the complainant for the value of the term.

Ruffner has answered, admitting that Walters made repairs and improvements on the property, for which he was to be credited on the account of rent; that Walters assumed to pay certain claims for Ruffner, which were to be credited on the rent account; but that Walters failed to pay off these debts, and that Ruffner subsequently was compelled to pay them.

It is also averred in the answer that Walters, in addition to the payments above referred to, agreed to pay monthly a certain money rent, which he failed to pay; that when he left, he assigned his interest to one Lamb, who himself afterwards abandoned the property without paying the rent; that the property was very much out of repair, and that it could only be rendered fit for use after a 203] large expenditure of money *and considerable delay. It is also alleged, in the answer, that there was a stipulation of forfeiture in the lease, and that after Lamb had left the property in an exposed situation, Ruffner entered, etc. Ruffner further answers that he had sold and conveyed the property to Smith.

In March, 1851, the complainant amended his bill, making Smith the purchaser from Ruffner, and the Cornings, to whom Smith had sold the property, also defendants.

The bill, as amended, seeks to charge Smith and the Cornings for the portion of the term during which they respectively held the property. These last defendants have answered the bill, setting up that the lease was forfeited at the time that Ruffner entered.

They also set up their respective purchases of the property, and claim that they are *bona fide* purchasers without notice, alleging

that the suit being commenced in Fairfield county, and the property situate in Licking county, they are not chargeable with constructive notice of the pendency of the litigation.

The cause was tried in the court below as to the defendant Ruffner alone, and the bill dismissed as to him. The complainant has appealed from that decree, and the only question presented to the court is on a motion by the defendant, Ruffner, to dismiss the appeal.

Several reasons are assigned for the dismissal of the appeal. In substance, however, they all amount to this: that the cause, as far as Smith and the Cornings are concerned, is still pending and undisposed of in the court of common pleas; that the appeal, therefore, only brings up the case of Ruffner to the district court; and that the interest of Ruffner and these other defendants are so inseparably blended, that a decree can not be rendered as to one without at the same time passing on the rights of others.

By the fourth section of the act regulating appeals to the district court it is provided "that in all cases where the interest of any party desiring an appeal is separate and distinct from that of the other party or parties, and he shall *be desirous to appeal [204 the part of the case in which he is interested, it shall be so allowed by the court," etc. 50 Ohio L. 93. The previous statute on this subject provides, "that any party to a suit in chancery may appeal his separate part of the suit," etc. 43 Ohio L. 126.

These statutes are substantially similar in their provisions, giving to a party, in a case where there has been a final decree, and where his interests are separate from the other parties with whom he may have been united in the suit, the right to appeal his separate part of the case; and this is on the ground that his interests are so separate and distinct from the others, that they can be separately adjudicated in the appellate court.

These statutes do not provide for the mode in which the trial is to be had in the court below. It is true, however, that it is a practice well established in chancery proceeding, that the court may, where the case is divisible, as where a complainant proceeds against a number of defendants, and where there is no connection between the defendants, so that the rights of the complainant against some of them may be adjudicated without in any way affecting the rights or liabilities of the others, to enter separate decrees and at different times.

The present case furnishes us with an example. Here are a number of defendants who are charged in the bill as holding certain equities, belonging to John Walters, in separate distinct pieces of property, and where there is no connection whatever between the persons and the property, except that they are all charged as holding in trust for the same person. If the court had proceeded to decide the case as to Ruffner, Smith, and the Cornings, who had no connection with the other defendants, or with the other pieces of property, it would have been clearly proper to have done so, and such decree could have been appealed from, although the rest of the case had been left undisposed of in the court below. And if there had been a decree as to all of these persons, and their interests were so 205] inseparably connected, *that the case could not be passed on without an adjudication of all their rights, then the appeal either by the complainant or any one of the defendants would have vacated the decree and brought up the case as to all of them. But there has been no decree as to Smith and the Cornings in the court below; until which time, as we think, they can not be brought into the appellate court. This brings us to the question whether the interests of Ruffner, Smith and the Cornings are so inseparably connected that it is necessary to have them all before the court, to render the proper decree. We think their connection with this lease, for the use and occupancy of which they are all sought to be charged, is such as to render them necessary parties to the same decree, if a decree should be rendered against them. One of the peculiar advantages of a court of chancery is, that it can not only decree between the complainants and defendants, but can also modify its decree so as to preserve the equities between the defendants themselves, as in a case where all of the defendants are liable to the complainant; but where from some relation existing between the defendants one of them should respond to the decree and save the rest harmless from its operation, in that case the defendants in whose favor this equity exists have a right to claim that a decree shall be so modified as to operate first against the defendant on whom such obligation rests before proceeding against them.

Now in this case, supposing all of the defendants to be liable to the complainant for such time as they respectively had the use of this property, the pleadings on both sides show that Smith purchased from Ruffner with covenants against incumbrances, and the Cornings from Smith in the same way, and if it should be found

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that Ruffner was bound to indemnify the other defendants against this incumbrance it would be clearly competent for them to ask that the decree should first operate on Ruffner for the whole amount, and only operate on them in case he was unable to respond.

The claim of the complainant necessarily involves an account of the value of this term, in which all the *defendants are in- [206] terested. They, too, all rely on a common defense, namely, that the lease was forfeited when Ruffner entered, and we think were properly parties to the same suit; if the appeal were sustained, they would be separated, and would be liable to have their rights adjudicated in different tribunals, where contradictory decisions might be made.

An appeal from a lower to a higher court only exists where something has been passed on and definitely settled in the lower court, and which is susceptible of being properly adjudicated in the appellate court; such does not appear to us to be the effects of this decree. So far as the question of appeal is concerned, we think this decree is a nullity, and that the remedy of the plaintiff is on motion to the court of common pleas, to set the decree aside for irregularity, which we have no doubt that court has the right to do.

Appeal dismissed.

LAWSON & COVODE v. THE FARMERS' BANK OF SALEM.

Since the passage of the statute of March, 1850, to improve the law of evidence, which provides that a personal interest in the event of a suit shall not render a witness incompetent, the objection to a stockholder in a corporation testifying as a witness on behalf of the corporation, goes to the credibility, and not to the competency of the witness.

The holder of a bill of exchange, in order to charge an indorser residing in another state or place, adopting the mail as the means of conveying the notice of the dishonor of the bill, *may* send the notice by the mail of the day of the default, but if not, he *must* deposit the notice, directed to the indorser in the post office in time to be sent by the mail of the day next after the day of the dishonor, unless the mail of that day be made up and closed at an unreasonably early hour, or in other words, before early business hours; and if there be no mail of that day, or the mail of that day be closed at an unreasonably early hour, then by the next practicable mail.

Where a bill was protested in the city of Pittsburg on the 27th of July, and the

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departure of the only mail of the next day to the place of the residence of the indorser, was ten o'clock A. M., the time of the closing of the mail being ten minutes after nine o'clock, and not before convenient early business hours, the holder does not use due diligence if he neglects to send the notice of dishonor by that mail.

207] *The holder of a bill is not bound to give notice of the dishonor to any more than his first immediate indorser. And each party to a bill has the same time for giving notice to parties prior to him that the holder has.

After an agent to whom a bill is sent for collection has given notice to the principal, the same time thereafter is allowed to the principal for giving notice to the indorser as if he had himself been an indorser receiving notice from the holder.

ERROR to the court of common pleas of Columbiana county, reserved in the district court for decision by the supreme court.

The original action was assumpsit, for recovery against Lawson & Covode, as endorsers of a bill of exchange, which is as follows:

WELLSVILLE, April 25, 1848.

\$4,000.00. Ninety days after date, pay to the order of Lawson & Covode, four thousand dollars, value received, and place the same to the account of

Yours, etc.,

W. F. JORDAN.

To J. Jordan & Son, Pittsburgh,

"Pay to Farmers' Bank of Salem,

LAWSON & COVODE."

Accepted by J. Jordan & Son.

The declaration counts upon the instrument above mentioned, and also contains the common counts.

Plea—Non-assumpsit.

It appears that this bill of exchange, which was drawn and endorsed in this state, was discounted by the Bank of Salem, and the money paid to the acceptors thereof; subsequently it was indorsed by the Bank of Salem to the Exchange Bank of Pittsburgh, in the State of Pennsylvania, for collection, Jordan & Son, the acceptors living in the city of Pittsburgh. It matured in the hands of the Exchange Bank of Pittsburgh on the 27th day of July, 1848, and, being dishonored by the acceptors in Pittsburgh, was protested for non-payment by Webb Closey, a notary public of that city.

On the trial of the cause in the court of common pleas, the bank gave in evidence the bill of exchange and the notarial protest attached thereto, dated July 27, 1848; also a certified copy of the

notarial record of Webb Closey, with *proof of his death [208 since the protest of the bill. The defendants below objected to this last testimony, but the court admitted it. During the trial the bank called Joseph J. Brooks and John Dellenbough as witnesses, both being stockholders and directors in the Salem Bank, not only at that time but also when the bill was discounted and matured. To the testimony of these two witnesses the defendants below objected, but the court overruled the objection and admitted their testimony, which was material.

The bank having rested, the defendants in the court below gave in evidence the notice of protest which appears in the record sent to the Salem Bank by Notary Closey, and produced by the cashier of the Salem Bank. And evidence having been given that the Exchange Bank of Pittsburgh closed at three o'clock P. M. on the 27th July, 1848; that Notary Closey's office was about one square from the Pittsburgh post office; that the mail left Pittsburgh for Salem at ten o'clock A. M. on the 28th of July, and was closed at ten minutes after nine o'clock A. M., and that the business hours of Pittsburgh were from seven o'clock A. M. till dusk, the parties rested the case. The notarial protest does not state when the notices were deposited in the post office, but the notice to the Salem Bank, which enveloped the notice to Lawson & Covode, the accommodation indorsers, is mail marked at the Pittsburgh post office, July 29, 1848..

The bill of exceptions taken upon the trial shows that the defendants below excepted to the ruling of the court as to the admissibility of the testimony to which they objected, and also to that part of the charge of the court to the jury, which is as follows:

"It will be proper to consider further whether any legal notice was given, and due diligence used to fix the liability of these defendants. If it appear from the proof that the demand was made on the 27th of July, the last day of grace, and payment refused, and that notice to the defendants of such demand and non-payment was deposited in the post office at Pittsburgh, at any time on the 28th of July, it was proper and sufficient notice. The law gives the entire day *after the day of dishonor*, which was the 27th of July, to the notary to deposit the notice in the post office.

*"It is therefore immaterial, whether the notice in this case [209 was deposited by the notary before the closing of the mail at the post-office at Pittsburgh, before or after nine or ten o'clock A. M. of

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that day, if the notice is proven to be in the office on the 28th. And, moreover, if the proof satisfy the jury that the notice of the dishonor of this bill could not be conveniently deposited in the office, on the 28th of July, in time for the mail of that day (as we have already substantially said), then it was in proper time, if said notice was deposited in time to be sent out by the next mail after the 28th of July. In this connection it may be proper to observe to the jury that the plaintiffs are in no way to be affected by the delays, mistakes or oversights of the post-office, or its agents. And, if it appears that the notice given, or attempted to be given to these defendants, was not sent by the *direct* mail, from Pittsburgh to Wells-ville, but by the mail from Pittsburgh to Salem, and from thence to Wellsville, that fact will not defeat the plaintiff's right of recovery, if the notice to the defendants was deposited in the post-office at Pitts-burgh in proper time, directed to the Bank of Salem, and by that bank forwarded to the defendants at Wellsville by the next mail after the receipt of the said notice at Salem."

A verdict was returned for the plaintiff, for \$4,513.33; on which judgment was rendered by the court of common pleas at the Sep-tember term thereof, 1850, to reverse which, this writ of error is brought.

D. M. Lee, also *Umbstaetter & Stanton*, for plaintiffs in error..

Upham & Brooks, for defendant in error; *Lennox v. Roberts*, 2 Wheat. 373; 3 Kent Com. 106; Story on Bills, secs. 288, 300; 9 Pet. 33; 4 Bing. 715; 5 Man. & Sel. 68; 2 Barn. & Ald. 401 Id. 496; *Sussex Bank v. Baldwin*, 2 Harr. 488; *Chick v. Pillbury*, 24 Me. 458; *Choteau v. Webster*, 1 Met. 1; *Wright v. Shawcross*, 2 Barn. & Ald. 501.

BARTLEY, J. Several questions are presented by the assignment of errors; but it will be sufficient to notice the following:

1. Were Brooks and Dellenbough; competent witnesses for the plaintiff, on the trial in the court below?

2. Did the court err, in the charge to the jury, as to the suffi-ciency of the notice of the dishonor of the bill?

The first question involves the construction to be given to the 210] third section of the statute of March, 1850, to improve *the law of evidence, which provides that "no person offered as a wit-ness shall be excluded by reason of his or her interest in the event of the action; but this section shall not apply to a party to the

action, nor to any party for whose immediate benefit such action is prosecuted or defended," etc.

This statute, being remedial in its nature, is entitled to a liberal construction. The tendency of legislation has been of late to throw wide open the door for the admission of testimony, and, in the administration of justice, to repose rather upon objections to the credibility, than to the competency of witnesses.

A stockholder in a private corporation is interested in the event of any suit to which the company is a party. His interest is not immediate or direct, yet it is that legal interest which would render him incompetent as a witness on behalf of the corporation, without the provision of the statute above mentioned. The interest of a stockholder, in the absence of any special liability, is not increased by his becoming director. The directors of a corporation are simply agents in directing the management of its business, and this agency does not render their personal interest any more immediate or direct than that of other stockholders, when not coupled with a special individual liability of the directors for the debts of the corporation. So far, therefore, as the testimony of these witnesses was objectionable on the ground of interest, the objection went to their credibility, and not to their competency.

Were these witnesses, then, incompetent on the ground of being parties to the action, or parties for whose immediate benefit the action was prosecuted? A party to the action is a person whose name appears upon the record in the case, either as party plaintiff, or defendant. They were not, therefore, actual parties to the action; but were they parties for whose immediate benefit the action was prosecuted? The statutory exception of "any party for whose immediate benefit such action is prosecuted or defended," has an evident reference to that class of cases where the real party, not named upon the record, prosecutes or defends through the medium of a mere nominal party in the action. The requisite qualification to bring a person within the exception is, that he be not simply interested in the event of the suit, but the object of immediate consideration in the suit, or the real beneficiary for whom the suit is prosecuted or defended. To constitute this, the interest of such person in the suit must be direct and immediate, and not contingent, indirect, or remote. A stockholder, and the corporation of which he is a member, are separate and distinct persons in law, and their interests are always distinct, and sometimes adverse. A

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person may either sue, or be sued by a corporation of which he is a member. A judgment against the Bank of Salem would reach the property of the corporation, but could not bind the separate property of the stockholder, in his individual capacity. And a judgment in favor of the bank would not inure to the immediate benefit of any of the stockholders, but their interest in such judgment would be indirect and depend on contingencies. The *immediate benefit* contemplated by the statute to create the incompetency, is an interest or advantage resulting to him personally, as the immediate and necessary consequence of the judgment itself, and not such as might reach him indirectly, through the medium of another person, and dependent upon a contingency.

The statute of Ohio above referred to is very similar to Lord Denman's act, 6 & 7 Vict. c. 85, so far as it relates to the interest of witnesses and the incompetency of parties. And the language of the exception in the English act is "*for whose immediate and individual benefit*," instead of "*for whose immediate benefit*" the suit is prosecuted or defended. Numerous decisions have been made in England, giving a construction to this act similar to that which we have here given to the Ohio statute. In the case of *Black v. Jones*, 3 Eng. L. and Eq. 559, it was decided that a creditor for whose benefit an assignment has been made to a trustee by the debtor, is a competent witness for the trustee in an action brought by him against an execution creditor of the debtor, who had levied upon [212] the goods, when the very question was as to the validity of the deed. Also, in the case of *Harding v. Hodgkinson*, 4 Eng. L. & Eq. 462, it was held that a person entitled to a share in the proceeds of land devised to another, in trust for sale, is a competent witness in an action brought by the latter to establish his right to the land for the purpose aforesaid.

The court of exchequer in England is reported as saying that "the test whether a witness is a person in whose immediate and individual behalf an action is brought or defended, either wholly or in part, is, whether his declarations would be admissible against the party on whose behalf he is called to give evidence."

In the case before us a majority of the court hold that the court of common pleas did not err in their ruling on the subject of the admissibility of the testimony in question.

Touching the second question, then, did the court of common pleas err in charging the jury, that, if the notice to the indorsers

of the demand and non-payment of the bill was deposited in the post-office at Pittsburgh, *at any time during the day after the day of dishonor*, without regard to the time of the departure of the mail for that day, it would be sufficient notice; and, moreover, that if it was found inconvenient to deposit the notice in the post-office in time for the mail of that day, it was in proper time if the notice was deposited in time to be sent off by the next mail of the day next after the day following the day of the dishonor of the bill?

This involves a very important question of the law merchant, and it is not a little surprising that there should remain any doubt or uncertainty, at this late day, upon a question of such vital importance to the interest of commercial countries respecting the duties and liabilities of holders and parties to dishonored paper. And it is a matter of no small moment, that a question which enters so largely as does this into the every-day business transactions of different commercial states and countries, should be settled, not only upon a certain and unvarying, but also upon a uniform basis.

*The liability of the indorser is strictly conditional—de- [213] pendent both upon due demand of payment upon the maker or acceptor, and also due and legal notice of the non-payment. The purpose and object of such demand and notice is to enable the indorser to look to his own interest, and take immediate measures for his indemnity. The demand and notice being conditions precedent to the indorser's liability, it is incumbent on the holder to make clear and satisfactory proof of them before he can recover. The plaintiffs in error in this case, being accommodation indorsers, may well insist upon strict proof of due diligence in giving notice of the dishonor of the bill.

The law does not require the utmost diligence in the holder in giving notice to the dishonor of a bill or note. All that is requisite is ordinary or reasonable diligence. And this is not only the rule and requirement of the law merchant, but a statutory provision of this state. But what amounts to due diligence or reasonable notice is, when the facts are ascertained, purely a question of law, settled "with a view to practical convenience and the usual course of business."

The question was at one time strenuously contested, whether due diligence did not require that where the parties reside in the same place, the notice of non-payment should be given on the day of the

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dishonor of the bill; and where the parties reside in different places, should be sent by the mail of that day, or the first possible or practicable mail after the default. *Tindal v. Brown*, 1 Term. 167; *Darbishire v. Parker*, 6 East. 3; *Marius on Bills*, 24. But the rule was established and is supported by great weight of authority, that where the parties reside in different places, and the post is the mode of conveyance adopted, although it was in no case necessary to send the notice by the post of the same day of the dishonor, or of the knowledge of the dishonor, the holder being entitled to the whole of that day, being the day of the dishonor or knowledge of the dishonor, to prepare his notice; yet that the notice would be insufficient unless put into the 214] post-office in time to go by the next *mail after that day. And this is in conformity with the rule laid down by Mr. Chitty, in his learned treatise on bills of exchange, in the following explicit language: "When the parties do not reside in the same place, and the notice is to be sent by general post, then the holder or party to give the notice must take care to forward notice by the post of the next day after the dishonor, or after he receives notice of such dishonor, whether that post sets off from the place where he is early or late; and if there be no post on such next day, then he must send off notice by the very next post that occurs after that day." *Chitty on Bills*, 485.

This is in accordance with the rule as settled by the supreme court of the United States. In *Lenox v. Roberts*, 2 Wheat. 373, Chief Justice Marshall says: "It is the opinion of the court that notice of the default of the maker should be put into the post-office early enough to be sent by the mail of the day succeeding the last day of grace." And in the case of *The Bank of Alexandria v. Swan*, 9 Pet. 33, Mr. Justice Thompson approved of the general rule laid down in the case of *Lenox v. Roberts*, holding that notice of the dishonor need not be forwarded on the last day of grace, but should be sent by the mail of the next day after the dishonor. The same rule was adopted by Mr. Justice Washington, in the case of *The United States v. Parker's Adm'rs*, 4 Wash. 465; and in which case subsequently that decision was affirmed on error by the supreme court (12 Wheat. 559). The same rule received the sanction of Mr. Justice Story, in the case of the *Seventh Ward Bank v. Hanrick*, 2 Story, 416. Although, in the case of *Mitchell v. Degrand*, 1 Mason, 180, he appears to have been disposed to even

greater strictness, holding that when a bill is once dishonored, the holder is bound to give notice by the next practicable mail to the parties whom he means to charge for the default. This, however, is explained by Mr. Justice Washington, in the case of *United States v. Parker's Adm'rs*, to mean that the notice should be put into the office in time to be sent by the mail of the succeeding day. This rule, adopted by *the supreme court of the United States, [215 and which is supported by the great weight of authority in England and in the several states of the Union in which the question appears to have been settled by reported adjudications, is subject to some qualification relaxing its rigor. If two mails leave the same day on the route to the place of the residence of the indorser, it is sufficient to deposit the notice in the post office in time to go by either mail of that day, inasmuch as the fractions of the day are not counted. *Whitewell v. Johnson*, 17 Mass. 449, 454; *Howard v. Ives*, 1 Hill (N. Y.) 263.

And for the reason that the mail of the day succeeding the day of the default may go out in some places soon after midnight, or at a very early hour in the morning, and is sometimes made up and closed the evening preceding, it has been adjudged that inasmuch as the holder is allowed till the day after the day of default to send off the notice, reasonable diligence would not require him to deposit the notice in the post office at an unseasonably early hour, or before a reasonable time can be had for depositing the notice in the post office after early business hours of that day. The rule, as qualified and settled by the late authorities, and which I take to be the correct one, is, that where the parties reside in the same place or city, the notice *may* be given on the day of default; but if given at any time before the expiration of the day thereafter it will be sufficient; and when the parties reside in different places or states the notice *may* be sent by the mail of the day of the default; but, if not, it *must* be deposited in the office in time for the mail of the next day, provided the mail of that day be not made up and closed at an unreasonably early hour. If, however, the mail of that day be closed before a reasonable time after early business hours, or if there be no mail sent out on that day, then it must be deposited in time for the next possible post. In the case of *Downs v. Planters' Bank*, 1 S. & M., 261; and also the case of *Chick v. Pillsbury*, 24 M., 458, the doctrine on this subject has been more fully examined than perhaps in any of the older cases; and the rule *adopted [216

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is, that the notice, in order to charge the indorser living in another place or state, *must* be deposited in the post office in time to be sent by the mail of the day succeeding the day of the dishonor, providing the mail of that day be not closed at an unreasonably early hour, or before early and convenient business hours. And this rule is well sustained by authority. *Fullerton et al. v. The Bank of the U. S.*, 1 Pet. 605, 618; *Eagle Bank v. Chapin*, 3 Pick. 180, 183; *Talbot v. Clark*, 8 Pick. 51; *Carter v. Burly*; 9 N. H. 559, 570; *Farmers' Bank of Maryland v. Duvall*, 7 Gill and J., 79; *Freeman's Bank v. Perkins*, 18 M., 292; *Meade v. Engs*, 5 Cow. 303; *Sewall v. Russell*, 3 Wend. 276; *Brown v. Ferguson*, 4 Leigh. 37; *Dodge v. Bank of Kentucky*, 2 Marsh. 610; *Hickman v. Ryan*, 5 Littell, 24; *Hartford Bank v. Steedman*, 3 Conn. 489; *Brenger v. Wightman*, 7 Watts and Serg. 264; *Townsley v. Springer*, 1 Lou. 122; *Bank of Natchez v. King*, 2 Rob. 243; *Brown v. Turner*, 1 Ala. 752; *Lockwood v. Crawford*, 18 Conn. 363; *Bayley on Bills*, 262; *Story on Prom. Notes*, sec. 325; and *Byles on Bills*, 160.

Some obscurity and uncertainty have been created on this subject by the expression used in some of the cases, and by some of the elementary writers, that the holder or person giving the notice has "one day" or "an entire day" in which to give the notice after the day of the dishonor. The term one day or an entire day seems not to have been used always in the same sense; and the confusion appears to have in part arisen from the fact that where the parties reside in the same place, notice at any time before the expiration of the day after the day of the default will be sufficient, while where the parties reside in different places, the notice must frequently be mailed early in the day to be in time for the mail of that day.

The defendant in error relies upon the doctrine laid down in the elementary works of Chancellor Kent and Mr. Justice Story, as fully sustaining the charge of the court below. Inasmuch as pre-217] cision and certainty in the settlement of this *rule are of very great importance, a careful examination of the subject seems to be required.

Chancellor Kent, whose accuracy in his Commentaries on American Law is never to be questioned without grave consideration, in the late editions of his works, 3 Kent's Com. 106, states the rule as follows: "According to the modern doctrine, the notice must be given by the first direct and regular conveyance. This means the

first mail that goes after the day next to the third day of grace; so that if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice may indeed be sent on Thursday, but must be put into the post-office or mailed on Friday, so as to be forwarded as soon as possible thereafter."

And in a note by the learned author explanatory of the text it is said that "the principle that ordinary, reasonable diligence is sufficient, and that the law does not regard the fractions of the day in sending notice, will sustain the rule as it is now generally and best understood in England; and in the commercial part of the United States, that notice put into the post-office on the next day, at any time of the day, so as to be ready for the first mail that goes thereafter, is due notice, though it may not be mailed in season to go by the mail of the day next after the day of the default."

Several cases are cited by the learned author, but they do not sustain his position. The case of *Jackson v. Richards*, 2 Caine's Cas. 343, referred to is not in point. *Haynes v. Birks*, 3 Bos. & Pul. 601, decides that when the note fell due on Saturday, the notice sent by the post on Monday was sufficient. Sunday being excluded and not taken into the account, the notice was sent by the post of the next legal day. In the cases of *Bray v. Hadwen*, 5 Maule & S. 68, and *Wright v. Shawcross*, 2 Barn. & Ald. 501, it was decided that the notice having arrived on Sunday, was to be considered as having been received on Monday, and then the party had till Tuesday, the next post day, for giving the notice. In *Gall v. Jeremy*, 1 M. & M. 61, where no mail went out on the day next after the day of the default, it was held that the rule being an impossible one on that day, a notice sent by the next succeeding mail day would be in season. The case of *Firth v. Thrush*, 8 B. & C. 387, turned upon the question *whether the attorney employed to ascertain the residence of the defendant, should be allowed a day to consult his client after information of the defendant's residence. And Lord Tenterden said, "if the letter (giving information of the defendant's residence) had been sent to the principal, he would have been bound to give notice on the next day." The only other case referred to is that of *Hawkes v. Salter*, 4 Bing. 715; and this is the only one which even tends to sustain the position of the learned author. In that case the bill was dishonored on Saturday, and the mail left at half-past nine o'clock on Monday morning; and an unsuccessful attempt was made to prove that the notice was put into the post-office on

Tuesday morning. Best, C. J., expressed himself clearly of opinion "that it would have been sufficient if the letter had been put into the post-office before the mail started on the Tuesday morning, but that there was no sufficient evidence that it had been put in even on Tuesday morning." The opinion in this case was, therefore, a mere dictum, which determined nothing, the case being decided upon a different ground.

But the position of Chancellor Kent, above referred to, is in direct conflict with the rule, as laid down by himself in the first edition of his work. In the edition of 1828, 3 Kent's Com. 73, the rule is stated in these words:

"According to the modern doctrine the notice must be given by the first direct regular conveyance. This means the first convenient and practicable mail that goes on the day next to the third day of grace; so that if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice may indeed be sent on Thursday, but must be sent by the mail that goes on Friday." In the last edition of this work, published in 1851, the editor, Mr. William Kent, admits the weight of authority to be in favor of the rule as laid down in *Chick v. Pillsbury*, and *Downs v. Planters' Bank*, above referred to; and he says that "the opinion of Chief Justice Best, in 4 Bing. 715, is the only one that sustains the rule suggested, and that the observations of Mr. Justice Story were too latitudinarian in allowing the entire whole day next after the dishonor."

It is true that Mr. Justice Story, in his work on bills of exchange, 219] sec. 291, says that an indorser need not give *notice to his antecedent indorser till twenty-four hours have elapsed after the receipt of his own notice of the dishonor. And in his note to sec. 290 of the same work the author says that "the rule does not appear to be so strict as it is laid down by Mr. Chitty, and that it would be more correct to say that the holder is entitled to one whole day to prepare his notice, and that, therefore, it will be sufficient if he sends it by the next post that goes after twenty-four hours from the time of the dishonor, etc. And he adds: "I have seen no late case which imports a different doctrine; on the contrary, they appear to me to sustain it; but, as I do not know of any direct authority which positively so decides, this remark is merely propounded for the consideration of the learned reader."

It is not necessary here to inquire whether the position taken by the learned author is in conflict with the decisions made by himself in 1 Mason, 180, and 2 Story, 416, above referred to. In his same work on bills of exchange, he has stated the rule with great precision and accuracy in the following language, in sec. 382: "In all cases where notice is required to be given, it is sufficient, if the notice is personal, that it is given on the day succeeding the day of the dishonor, early enough for the party to receive it on that day. If sent by the mail, it is sufficient if it is sent by the mail of the next day, or the next practicable mail." And in sec. 288: "If the post or mail leaves the next day after the dishonor, the notice should be sent by that post or mail, if the time of its closing or departure is not at too early an hour to disable the holder from a reasonable performance of the duty. So that the rule may be fairly stated in more general terms to be, that the notice is in all cases to be sent by the next practical post or mail after the day of the dishonor, having a due reference to all the circumstances of the case."

The same learned author has laid down the rule very fully to the same effect in his work on promissory notes, sec. 324.

The statement of the rule in the last extract is consistent with the doctrine established by the supreme court of the United States, and fully sustained by authority.

The discrepancies which have arisen on this subject appear to have grown out of an inaccurate use in some of the *books [220] and decisions of the terms "*his day*," "*an entire day*," and "*a whole day*," etc. These phrases being at one time understood or taken literally, and at another time to mean a space of time equal to a full day. If these phrases are to be taken to mean the duration of a full day instead of the day itself, in their general application, the effect would be to change and break down numerous well-settled and useful rules. The law, as a general thing, does not have regard to the fractions of a day, and thus compel parties to resort to nice questions of the sufficiency of a certain number of hours or minutes, and to the taking of the parts of two different days to make up what may be considered in one sense a day, because equal in duration to one entire day. If this were the case, the indorser, after having been notified, would often be unable to determine whether he had been notified in season or not, until he had learned the hour of the day when the default occurred; and the holder would have it in his power at times of affecting injuri-

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ously the right of the indorser to an early notice, by delaying the presentment until a late hour in the day. Nothing more could have been intended by the use of these phrases than that each party should have a specified day upon which the act enjoined upon him should be performed. This is the sense in which Lord Ellenborough used it in the case of *Smith v. Mullett*, 2 Camp. 208, when he said: "If a party has an entire day, he must send off his letter conveying the notice within post time of that day." And it is said by a learned elementary author, "if a party has an entire day he must send off his letter conveying the notice of the dishonor of the bill within post time of that day." Byles on Bills, 161.

The rule laid down in Smith's Mercantile Law, to which the defendant in error has referred, will not, as I apprehend, be found on close examination to be at variance with the doctrine here adopted. Smith's Mer. Law, 310.

It is claimed on behalf of the plaintiffs in error in this case that the notice of the dishonor of the bill should have been sent immediately to them instead of being sent as it was in *the first place to the bank of Salem. The holder is not bound to give notice of the dishonor to any more than his immediate indorser. And each party to a bill has the same time after notice to himself for giving notice to other parties beyond him, that was allowed to the holder after the default. *Sheldon v. Benham*, 4 Hill (N. Y.) 129; *Eagle Bank v. Hathaway*, 5 Met. 213. And when a bill is sent to an agent for collection, the agent is required simply to give notice of the dishonor in due time to his principal; and the principal then has the same time for giving notice to the indorsers after such notice from his agent as if he had been himself an indorser receiving notice from a holder. *Bank of the U. S. v. Davis*, 2 Hill (N. Y.) 452; *Church v. Barlow*, 9 Pick. 547. The party in this case, therefore, was not at fault by sending the notice directly to the Bank of Salem, leaving that bank to send the notice to the plaintiffs in error.

Applying the rule, therefore, which we have adopted as the correct one to this case, it was incumbent on the plaintiff below, in order to be entitled to a recovery, to show that the notice of the dishonor of the bill was deposited in the post office in Pittsburgh in time to be sent by the mail of the 28th day of July. Ten minutes past nine o'clock in the morning was not an unreasonably early hour or before a reasonable and convenient time after the commencement of early business hours of the day. The neglect,

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therefore, to send the notice by the mail of the next day after the day of the default, operated to discharge the plaintiffs in error as indorsers, unless from some other cause notice had been dispensed with or rendered unnecessary. And for the charge of the court of common pleas to the jury to the contrary, the judgment is reversed and the cause remanded for further proceedings.

CORWIN, J., dissented from the opinion of the majority of the court on the first point.

Judgment of common pleas reversed.

*EDWARD BUTT v. THE ADMINISTRATOR OF MARGARET BUTT. [222

The heir is a competent witness for the administrator under the act to improve the law of evidence in a suit brought by the latter to recover a debt due the estate.

ERROR to the common pleas reserved in the district court in Morgan county.

J. E. & I. L. Hanna, for plaintiff in error

M. Clark, for defendant.

RANNEY, J. On the trial in the court below the defendant in error offered as a witness one of the heirs of the estate of Margaret Butt, for the purpose of proving the indebtedness of the plaintiff in error to the estate. His testimony was objected to, but the objection was overruled and the evidence given to the jury. It was admitted that the estate was solvent, and if the debts were collected there would be money to distribute to the heirs. The only question is, was the evidence admissible under the statute to improve the law of evidence? This case can not be distinguished in principle from that of *Lawson & Covode v. The Farmers' Bank of Salem*, ante 206, in which it was held that it was. As I was not permitted to participate in that decision, I take this opportunity to express my concurrence in the construction of the statute there given upon this point, and for the reasons therein stated.

Judgment affirmed.

THE CITY OF CINCINNATI v. JAMES WALLS.

An action of assumpsit for use and occupation, or on the money counts, can not be maintained where possession is held adversely under claim of title, and where no contract, express or implied, is shown.

The ordinance of the city of Cincinnati of May 5, 1827, regulating wharfage, made no provision for wharfage from ferry boats.

223] The defendant, having been for a long time in the adverse possession of a ferry landing in said city, and receiving rents therefor, is not liable to the city for such receipts until the right of the city to such landing is established by a proper proceeding for that purpose.

THIS is a writ of error to the superior court of Cincinnati, reserved in the county of Hamilton. The action was assumpsit for money had and received and money lent. Plea, non-assumpsit.

To support the action, the city of Cincinnati, plaintiff below, offered in evidence the acts incorporating the city and the several acts amendatory thereto, and the ordinance of the city, of May 5, 1827, "to establish a general system of wharfage in the city of Cincinnati," etc.; and evidence tending to show the dedication of Lawrence street, in said city, as a public highway, and that the defendant, for several years past, had used the foot of Lawrence street, on the Ohio river, as a ferry landing, and had leased the same for such purpose to other persons, and received rents therefor. The plaintiff also offered evidence which tended to show that defendant was owner in fee of the soil at the foot of said Lawrence street, as well as of the adjacent lots on each side of said street; that he had for a long time held and exercised, adversely to the city, the right to land his ferry-boat at the foot of said street, and received rents therefor. And upon this evidence the court, on motion of defendant, ordered that the plaintiff be non-suit, to reverse which judgment this suit is brought.

T. Walker, for plaintiff in error: *Lade v. Shephard*, 2 Strange, 1004; *McConnell v. Lexington*, 12 Wheat. 582; *Cincinnati v. White*, 6 Pet. 43; *Brown v. Manning*, 6 Ohio, 298; *United States v. Chicago*, 7 How. 185; *Rowan's Executors v. Portland*, 8 B. Mon. 232; *Durgan v. Baltimore*, 5 Gill & J. 357; *Barclay v. Howell's Lessee*, 6 Pet. 497; *Kennedy v. Jones*, 11 Ala. 63; *Pollard's Lessee v. Hagan*, 3 How. 212.

E. A. Ferguson, also for plaintiff; *Le Clerq v. Gallipolis*, 7 Ohio,

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part 1, 217; Lebanon v. Warren County, 9 Ohio, *80; 3 Paiges, [224 314; London Wharf, 1 Wm. Black. 581; Albany v. Trowbridge, 5 Hill, 71; Same case, 7 Hill, 429; Bingham v. Doane, 9 Ohio, 167; State v. Randall, 1 Stroth. 110; Pete v. Kendall, 6 Barn. & Cress. 703.

Fox & French, for defendant in error: *Butler v. Cowles*, 4 Ohio, 205; *Peters v. Elkins*, 14 Ohio, 344; *Richey v. Hinde*, 6 Ohio, 371; *Cortelyver v. Van Brundt*, 2 Johns. 362; *Pearsal v. Post*, 20 Wend. 111; 2 *McLean*, 481; *Harris v. Elliott*, 10 Pet. 54; *Lessee of Blanchard v. Porter*, 11 Ohio, 142; 2 *Hilliard Real Prop.* 36; *Conner v. New Albany*, 1 Blackf. 43; *Chambers v. Furry*, 1 Yeates, 167; *Cooper v. Smith*, 9 Serg. & R. 26; 3 *Watts*, 219; 8 *Watts*, 439; *City of New York v. Scott*, 1 Caines, 543; 1 *Sandf.* 344.

CORWIN, J. The questions of statutory dedication, and dedication at common law, and of the right of the plaintiff to take wharfage upon its highways leading to the Ohio river, and of the rights of the defendant, as owner in fee of the soil, have been elaborately argued by counsel; but in our opinion they do not properly arise in this case. If we concede that the exclusive right of the plaintiff to regulate and control wharfage at the foot of Lawrence street may be maintained, and that in a proper action for that purpose the defendant may be ousted of the rights which he claims to enjoy, yet it is difficult to perceive upon what principle he may be made liable in an action of assumpsit, where he is in the actual adverse possession of lands, claiming title where the relation of landlord and tenant does not exist, and where no express or implied promise is shown, 4 Ohio, 205; 6 Ohio, 371; 14 Ohio, 344.

But, independently of this consideration, there is nothing in the record to show that the defendant has ever received any money for such wharfage as is contemplated and provided for by the ordinance of the city of Cincinnati, the language of the first section of which is as follows:

"Be it ordained by the city council of Cincinnati, that from and after the tenth day of May, instant, each and every steamboat, barge, keelboat, and *flatboat which may land or anchor in [225 front and within one hundred feet of any public landing or wharf belonging to, or which may hereafter become the property of said city, shall pay the said city for wharfage the following sums of money," etc.

Here is no provision made for the collection of wharfage from a

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ferry boat, and it is not pretended that the defendant has at any time received wharfage from any *steamboat, barge, keelboat, or flatboat*.

Without touching the question as to how far the city of Cincinnati, in the exercise of her franchises, may hereafter assert and maintain an exclusive right to receive wharfage from any ferry boats landing at the foot of Lawrence street, it is a sufficient answer to this action to say that the moneys received by defendant have been received in the exercise of a right which he claims to exist in himself—a right which, for aught that appears on this record, the plaintiff has never even asserted, and that no express or implied contract by defendant with plaintiff is shown.

We see no error in the judgment of the superior court, and it is therefore affirmed with costs.

Judgment affirmed.

ISAAC TAYLOR v. JAMES BROWDER.

Vendee may maintain an action against vendor, upon a title bond, to recover damages for a failure to convey, without restoring possession of the premises.

Covenant will lie on a penal bond with a condition for a conveyance; the entire bond being declared on.

Where a condition to perform a specified act, as to convey land, is declared on, a plea of general performance of the covenants is insufficient. A special performance must be pleaded.

A plea of tender of a deed should either set out the deed in the plea or make profert of it.

A judgment can not be reversed on error because the form of action was misconceived, "in case the facts are substantially alleged which the party was bound to prove on the trial, in order to entitle him to a recovery."

226] *THIS is a writ of error to the supreme court in Greene county, allowed by the late supreme court in bank.

The case is fully stated in the opinion of the court.

Howard & Barlow, for plaintiff in error.

Henry Stansberry and W. Ellsberry, for defendant in error.

THURMAN, J. Taylor brought covenant against Browder in the

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common pleas of Greene county, on a penal bond, penalty \$478, subject to a condition as follows: "The condition of the above obligation is such, that if the above bound James Browder, his heirs, executors and administrators shall make, or cause to be made, a general warranty deed to the following described piece of land [description], then and in that case this obligation to be void, else to remain in full force and virtue."

The declaration averred a demand of the deed, and that a reasonable time for its execution and delivery had elapsed; but that the defendant had wholly neglected and refused to convey, etc.

The defendant pleaded *non est factum* and a special plea. To the special plea the plaintiff demurred generally, and, at October term 1848, the court sustained the demurrer, and gave the defendant leave to plead *de novo*, whereupon he cravedoyer of the bond and condition, and, setting them out in the first plea hereinafter mentioned, pleaded *non est factum* and two special pleas. To the special pleas plaintiffs demurred, and the demurrer was sustained at March term 1849, whereupon defendant obtained leave to amend, and, under the leave, filed a notice "as an appendage," in the language of the record to the plea of *non est factum*.

A jury trial followed, resulting in a verdict for plaintiff for \$460. The defendant moved for a new trial, assigning various reasons therefor, which motion was overruled and judgment given on the verdict, and defendant tendered a bill of exceptions which was signed and sealed.

Upon a writ of error prosecuted by the defendant, the late supreme court, sitting in Green county, reversed the judgment *of the common pleas, to reverse which judgment of reversal [227 the pending writ of error which was allowed by the late court in bank is prosecuted. The errors assigned are substantially:

1. That the supreme court erred in holding that the motion for a new trial should have been sustained.

2. That it erred in deciding that Taylor had misconceived his action.

3. That it reversed the judgment of the common pleas.

The record does not show upon what ground the judgment of the common pleas was reversed. Referring to the assignment of errors in the supreme court, we find eight supposed errors alleged. We will consider them all, though not in the order of their assignment.

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The fifth error is, that the common pleas erred in sustaining the demurrer at October term, 1848.

The plea demurred to was, *actio non*, because the said Browder saith, "that the said Isaac Taylor, to wit, on the 24th day of March, A. D. 1833, in pursuance of said writing obligatory, entered upon and took possession of the said tract of land, and has not at any time abandoned the same, or been evicted therefrom, but is still in the full possession and enjoyment thereof, with all the benefits and profits thereof, to wit, at the county aforesaid, concluding with a verification.

It is unnecessary for us to decide the question, mooted by counsel, whether this plea was not abandoned by the leave obtained to plead *de novo*, and the filing of new pleas; and whether the judgment sustaining the demurrer to it can be reviewed on error; for we are satisfied that the plea was no bar to the action.

In *Reed v. McGrew*, 5 Ohio, 386, the court said that, where a vendee sues his vendor on a contract for the conveyance of land, to recover damages for a refusal to convey, it is not necessary, as a preliminary step, that the vendee should surrender the possession. And this opinion is impliedly sustained by the cases of *Brown v. Witter*, 10 Ohio, 142, and *Taft v. Wildman*, 15 Ohio, 123.

228] *Indeed, we do not see any room for doubt upon the question. The action below was not to recover back the consideration money upon a rescission of the contract. Had it been, the possession of the land should have been surrendered before suit brought. But there was no attempt to rescind the contract. On the contrary, the action was upon the contract, and, upon no principle with which we are acquainted was it necessary to restore the possession to Browder.

But it is contended for the present defendant in error, that the declaration is defective in this, that it is in covenant, whereas it should have been in debt, and that, therefore, the court, looking to the first defect, should have overruled the demurrer. But we think the action was not misconceived.

In *Huddle v. Worthington*, 1 Ohio, 429, it was held that an action of covenant can not be sustained upon condition of a bond like this, if the declaration take no notice of the peral part of the bond. But the court added that "it might be different if the entire bond was declared on, as in the case of *Ward v. Johnson*, 1 Mun. 45, stating that the covenant "was made under the penalty in the

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obligatory part specified." In the case under consideration, the entire bond was declared on, in the manner above required.

In *Kennedy v. Kennedy*, 2 Bibb, 464, this question was fully considered, and it was held that an action of covenant will lie on the condition of title bond like the present. *Dougherty v. Lewellyn and Stewart*, 3 Bibb, 364, was covenant on the condition of an injunction bond. The action was maintained, and *Kennedy v. Kennedy* affirmed.

In *Clark et al. v. Redman*, 1 Black. 379, covenant was maintained on bonds like the present.

In *Perkins et al. v. Lyman*, 11 Mass. 83, the court strongly approve the following language of Lord Mansfield, in *Lowe v. Peers*. "There is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election to bring an action for the penalty, after which he can not resort to the covenant ; or to proceed upon the covenant and recover more or less *than the penalty." Other cases might [229 be cited, but it can hardly be necessary to multiply authorities upon this point.

The sixth alleged error is, that the court erred in sustaining the demurrer at March term, 1849.

This was a special demurrer to the two special pleas last filed.

The first of these pleas was *actio non*, "because he says that the said James Browder, at all times since the making of the said writing obligatory, and the condition thereof, has truly kept and performed all and singular the articles, covenants, clauses, conditions, and agreements in the said writing obligatory mentioned, according to the true intent and meaning of the same, and that he has been always ready and willing and yet is to make and deliver to the said Isaac Taylor a general warrantee deed for the said tract of land in the said declaration set forth and described, and all this he is ready to verify and prove as this honorable court shall award."

The causes of demurrer to this plea were :

1. That it does not contain a prayer for the judgment of the court.
2. That it does not specially state and set forth the manner of the performance in said plea alleged of the covenants and conditions of said writing obligatory.
3. That it is uncertain, informal and insufficient.

The averments of this plea are plainly inconsistent. It first avers performance and then a readiness to perform, and it is perhaps only

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by rejecting part of it as surplusage that it can escape the charge of repugnancy. But neither branch of it, nor both in manner and form aforesaid, are sufficient answers to the declaration. The obligor in the bond had but a single act to perform, to wit, to convey to the obligee a tract of land. The declaration avers that the conveyance was demanded and refused and has not been made. It will not do to meet this allegation with a general plea of performance or readiness to perform.

Tinney v. Ashley et al., 15 Pick. 546, was an action of debt by 230] vendee against vendors, on a title bond—breach, a *failure to convey. Among the pleas pleaded was one of general performance of covenants; to which there was a special demurrer on the ground that the plea alleged a performance of the condition in general terms, without stating in what manner it was performed; that although the condition was that the defendants do a specific act, yet they do not allege specifically that they did that act, nor do they allege any excuse for not doing the same. The court sustained the demurrer, saying, "In general, a plea of performance of a condition must show specially the manner of the performance. The exception is, where the matter is of so intricate and complicated a nature, or embraces such a variety of minute circumstances that a particular statement would cause great prolixity, which the law does not countenance. Chitty on Pl. 567. Thus, where the condition is to return all writs, or to account for all moneys received, a general performance may be well pleaded. Story on Pl. 154. But if the condition be to perform a specific act, as in the present case, a special performance must be pleaded."

In Bradley v. Osterhondt, 13 Johns. 404, a general plea of performance to a declaration, assigning a particular breach, was held bad even on general demurrer, and for the reasons above given.

We are satisfied that the common pleas properly sustained the demurrer to the plea in question.

The other plea demurred to was *actio non*, "because he saith that he did, to wit, on the 10th day of May, A. D. 1848, make, execute, and tender to the said Taylor a good general warrantee deed for the said tract of land in the said declaration mentioned, in due and legal form, and of which land he was and is in possession under said contract; but that the said Taylor did then and there refuse and decline to accept, and all of which the said Browder is ready to verify and prove."

The demurrer to this plea assigned, as causes of demurrer:

1. That said plea does not set forth a copy of the deed therein alleged to have been tendered.

*2. That the allegation of tender has no venue. [231]

3. The plea contains no prayer for judgment.

In *Soole v. Knowles*, 1 Bibb, 283, the original action was covenant by vendee against vendor in a title bond—breach, a failure to convey. Plea, that defendant did, on, etc., tender to plaintiff a deed agreeably to the true intent and meaning of the covenant, which the plaintiff refused to receive. Replication, rejoinder, and surrejoinder, making an issue to the country. Verdict and judgment for defendant—to reverse which the plaintiff prosecuted a writ of error. Held by the court, “that the plea is bad in *substance*, without showing the deed tendered, and furnishes no bar to the action; and it is not aided by the subsequent pleadings.”

The above language might seem to import that the deed should have been copied into the plea, but other parts of the opinion appear to warrant the conclusion that a *profert* would have been held sufficient.

It may be said that in strictness an instrument is not a deed before delivery, and that consequently no *profert* of it is necessary. But looking at the reasons for a *profert* in pleading, they will be found to apply with quite as much force to a plea of tender of a deed as to a pleading vouching a deed that has been delivered. A plea that a party has executed and tendered a deed according to the true intent of his covenant, is rather an averment of the legal effect of an instrument not shown to the court than an averment of a fact. The construction of the covenant and deed is matter for the determination of the court and not the jury; and the deed ought to be set out in the plea, or a *profert* made of it, so that the question may be raised by the pleadings, for the judgment of the court, whether the deed is such an one as the covenant requires. Such being our opinion, it is unnecessary to notice the other causes of demurrer. We think the demurrer was properly sustained.

The 7th alleged error was: That the action should have been debt instead of covenant.

*This has been answered already, and another answer to [232] it is found in 42 Ohio L. 72, sec. 2, which provides that no writ of error shall be allowed, after trial or judgment in the court of common pleas or supreme court, on account of any objection to the

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form of action in which the plaintiff may have declared, . . in case the facts are substantially alleged, which the party was bound to prove on the trial, in order to entitle him to recovery.

The 1st, 4th, and 8th errors assigned, relate to the verdict of the jury, and assert that it was unauthorized by and was against the evidence, and that it was for excessive whereas it should have been for only nominal damages.

We find nothing in the record to support these assignments. The bill of exceptions states but part of the evidence, and without the whole of it we have no means of knowing that the jury erred.

The 3d error assigned is, That the court erred in overruling the motion for a new trial.

We have already considered most of the reasons relied upon in support of that motion, they being the same in substance as those above assigned for error. The residue of them are the 3d, 5th, and 7th, and may be briefly disposed of. The 5th and 7th complain of the charge of the court in certain particulars, and the 3d asserts that the verdict of the jury was against the charge. But no part of the charge appears in the bill of exceptions, and these reasons are, therefore, of no avail upon writ of error.

The only remaining assignment of error is the second, to wit: That judgment was given for Taylor instead of for Browder. We see nothing in the record to warrant this assignment. The consequence is, that the supreme court erred, in our opinion, in reversing the judgment of the common pleas, and the judgment of reversal must be reversed and that of the common pleas be affirmed.

Judgment reversed.

**233] *THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK
OF WOOSTER v. HIRAM C. STEVENS AND OTHERS.**

A note or other obligation taken by a bank limited by its charter to six per centum interest upon its loans is void if more than that is reserved or paid, for want of corporate power to enter into such contract.

Such defense may be made to a suit brought to enforce such contract in equity, as well as at law.

But when the contract has been merged in a judgment, and a creditor's bill brought to obtain satisfaction, the parties to it are estopped, while it remains

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in force, from averring or proving such illegality to have existed in the obligation upon which it was founded, for the purpose of impeaching the judgment.

The remedy in such case can be had in a direct proceeding brought to set aside or impeach the judgment by motion in the same court to set it aside and let the party in to defend; or, under the circumstances of this case, by original or cross bill in chancery, filed for that purpose.

THIS is a bill in chancery reserved in the county of Medina.

The complainants filed their bill in the common pleas of Medina county, against Hiram C. Stevens, William R. Chidester, and William H. Alden and others, to subject certain equities of Stevens, Chidester, and Alden to the payment of a judgment against them in favor of complainants, in the same court.

This judgment was recovered, October term, 1849, upon a record of a judgment in favor of complainants and against defendants in the Richland county common pleas, at March term, 1837, which had become dormant. The judgment in Richland county was entered upon a warrant of attorney without notice to the defendants.

The defendants answer, admitting the recovery of the judgment at law, and that they have no property upon which execution could be levied to satisfy it. They do not disclose as to the equities sought to be subjected by the bill, but set up by way of defense that more than six per centum interest had been included in the bond on which the judgment was originally taken. Chidester and Alden, who were the sureties of Stevens, alleged that they had no knowledge before the judgment at law was recovered, that usurious interest was included in the bond.

*The complainants excepted to the answers. The court of [234 common pleas having overruled the exceptions, a replication was filed, the cause heard, and decree rendered against complainants dissolving the injunction dismissing the bill and vacating the judgment at law.

An appeal having been taken, the complainants urged their exceptions to the sufficiency of the answers in the district court, and the cause was thereupon reserved for decision in the supreme court.

E. Dean & N. H. Swayne, for complainants. 7 Ohio, 280; 3 Johns. Ch. 558; 5 Id. 140; 5 Id. 565; 3 Id. 399; 3 Ohio, 268; 4 Id. 469; 13 Id. 113; 6 Id. 37; 4 Id. 495; 12 Id. 271; 17 Ib. 190; 7 Cranch, 336; 3 Day, 30; 13 Mass. 265; Story's Eq. Pl., sec. 782.

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Canfield & Kimball, for defendants. 11 Ohio, 489; 13 Id. 107; *Fanning v. Dunham*, 5 Johns. Ch. 140; 1 Story's Eq. Jur. secs. 59, 301; 1 Paige, 429; 3 Bibb, 207; 5 Verm. 279; 4 Hen. & Mun. 447; 4 Rand. 282; 7 Cranch, 336; 2 Vesey, jr. 135; 3 McLean, 339; 4 Cowen, 641; 4 Vesey, 107; 11 Id. 293; 16 Id. 382.

RANNEY, J. In the view taken by the court in this case it becomes necessary to decide but a single question. Where a judgment creditor brings a creditor's bill to enforce satisfaction of his judgment by charging equities, can the judgment debtor be permitted to show in defense that the contract upon which the judgment was rendered was infected with usury or other illegality? The defendants place themselves upon this ground alone, and excuse themselves from further answering upon the assumption that this is a perfect answer to the equity of the bill when coupled with the fact that they were not advised of the usury until after the rendition of the judgment at law. In support of this position they insist that while it is true that a party invoking the aid of a court of equity to be relieved from usury can only do so upon pay-
235] ing what is equitably due, yet, as a defendant, he *may insist upon it as a perfect defense in equity as well as at law. That the illegality of the contract will constitute a sufficient reason why a court of equity will not lend its aid to enforce it. This is undoubtedly generally correct; and it is equally true that if the obligation upon which this judgment is founded was tainted with usury, it was absolutely void for the want of corporate power in the plaintiff to make it. 8 Ohio, 257; 11 Ib. 489; 13 Ib. 107.

But all this does not come to the point in hand. The question here is, can the party be permitted to go back of the judgment in a proceeding brought to enforce it and aver and prove such illegality? It certainly can not be necessary at this day to cite authorities to show that the judgment of a court of competent jurisdiction can not be impeached collaterally. It is a record of the highest character, importing absolute verity, and works a conclusive estoppel upon parties and privies to aver or prove anything against it. It speaks for itself, and when it has spoken the parties to it at least are bound to be silent. Without overturning the very foundations of the law, we are bound to hold that it can only be impeached upon a direct proceeding brought to reverse or annul it. The difficulty here is, not that a court of chancery can not refuse to

enforce a usurious obligation when that is proved, but it arises from the fact that the defendants are conclusively estopped from proving it against the judgment. While that stands unreversed and in force, no evidence can be received to impair the absolute verity which it imports. If, instead of this proceeding to obtain satisfaction of the judgment, an action of law had been brought upon it, I do not suppose it would be contended that a plea setting up usury in the obligation upon which it was founded, could be sustained; and yet it would not differ from the present attempt.

The power of a court of equity to allow such a defense is not more comprehensive than that of a court of law; and certainly a judgment when thus used is not less sacred in the one tribunal than in the other.

*We have examined all the cases cited by the defendants' [236 counsel, and can find nothing in any of them which militates against these views, unless a single remark made by the chancellor in *Fanning v. Dunham*, 5 Johns. Ch. 122, can be regarded as doing so. He is there reported to have said that "if the party claiming under an usurious judgment, or other security, resorts to this court to render his claim available, and the defendant sets up and establishes the charge of usury, the court will decide according to the letter of the statute, and deny all assistance and set aside every security and instrument whatsoever infected with usury." So far as concerns attempts to enforce any security in its nature disputable, or where the consideration may under the rules of law be inquired into, the doctrine is undeniably correct; but I do not think that eminent jurist intended here to deny what he has again and again, both as judge and commentator, laid down as to the inviolability of judgments. I think the word "judgment" was incautiously or inconsiderately used, and I am strengthened in this conclusion from the fact that the remark had nothing whatsoever to do with the case before him.

The bill in that case was filed directly to impeach a judgment containing usury rendered upon a warrant of attorney, and to set aside a foreclosure and sale of mortgaged premises by a power contained in the mortgage.

The bill was entertained for the reason that the courts of law in New York, in opposition to their former practice, had come to the determination not to open such judgments upon motion; but relief was denied because the complainant had not offered to pay what

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what was equitably due. No question, therefore, could have arisen as to the effect of the judgment when not thus directly attacked.

In the case of *Henry et al. v. Vermillion & Ashland R. R. Co.*, 17 Ohio, 187, an attempt was made to impeach the judgment upon which the proceeding was founded for fraud, but the court held that it could not be done. Nor does this view of the matter deprive the defendant of all remedy.

237] *It has long been the unquestioned doctrine in this state that judgments rendered upon warrants of attorney may, on motion, upon a proper case being made, be opened and the party let in to defend.

And in this case, as the claim has passed into a second judgment, and the defendants allege that they were ignorant of the existence of the usury until after it was obtained; and inasmuch as the complainant has come into equity to enforce it; we are of opinion that a cross bill may be filed to set aside the judgment upon such terms as the relation of the defendants to the matter will entitle them to assume.

The complainant will have leave to withdraw the replication to the answer and renew the exceptions, which will be sustained, and the cause remanded to the county for further proceedings.

DAVID B. ATKINSON AND ANOTHER v. DANIEL D. TOMLINSON, WILLIAM DUNN, AND OTHERS.

The statute of 1838, Swan's Stat. 717, relating to conveyances to trustees in trust to prefer creditors, does not apply to the case of a creditor taking security for a debt, from an insolvent debtor, where the security is taken in good faith, and where the sole object of it is to secure a debt.

So far as the case of *Mitchell v. Gazzam*, 12 Ohio, 815, holds that security taken in this way inures to the benefit of all the creditors, the decision is not sustained by law.

Where A and B are the sureties of C, and C, in failing circumstances, makes a transfer in good faith to A and B solely for the purpose of securing them for their liabilities for him, such transaction does not fall within the statute of 1838; but they have a right to the proceeds of such property, to be applied exclusively to the payment of the debts for which they are liable.

THIS is a bill in chancery reserved in the district court in Belmont county.

D. Peck, for complainants; *Mitchell v. Gazzam*, 12 Ohio, 315; 1 Id. 231; *Brown et al. v. Webb*, 20 Ohio, 400.

**Shannon*, for defendants; *Dunn v. Barry*, 8 Ohio, 390; 11 [238 Id. 394.

The case fully appears in the opinion of the court.

CALDWELL, C. J. The first question in the case arises on a motion to dismiss the appeal. Were this a case at law, there would be a diversity of opinion among the judges upon the motion; but we all agree that the case being in chancery, the appeal is well taken. We defer, however, expressing our views until a case at law, which is now pending before us, and in which a similar motion has been made, shall come up for decision.

The controversy arises in reference to an assignment of a stock of goods, made by the defendant, David D. Tomlinson, to the defendants, William Dunn and John Barry.

The evidence shows that Tomlinson had been for some time engaged in merchandise in the town of Morristown. Dunn and Barry had been his sureties on divers promissory notes, some of which were held by individuals, others by banks, amounting in all to \$1300. On the 3d of October, 1849, Dunn and Barry, having become alarmed as to the pecuniary situation of Tomlinson (it having been reported in the neighborhood that he was about to fail) met Tomlinson in St. Clairsville on his way from Wheeling, where he had been making a purchase of goods, and requested him to give them a bill of sale of his store to secure them against their liability for him. Tomlinson consented, and they went to the office of an attorney to have the writings drawn. Their attorney advised them that it was better for Tomlinson to make an absolute sale of the goods to Dunn and Barry. The attorney says that Tomlinson did make to Dunn and Barry an absolute and unconditional sale of the goods. He says, however, that the agreement was that Dunn and Barry were to sell the goods and collect the accounts as speedily as possible, and pay off the debts for which they were liable; and if any balance should remain, it was to be paid over to Tomlinson.

*Dunn and Barry took possession of the goods; an inventory was taken, which amounted to over \$1500. Two horses and a wagon and some other articles were also delivered over to Dunn

and Barry under the same agreement. Dunn, on the 5th of October, 1849, three days after the assignment, accepted an order drawn by Tomlinson in favor of McLellan, Knox & Co., who were also creditors of Tomlinson, for \$180, said order to be paid by Dunn out of any balance that might remain after the payment of the claims for which Dunn and Barry were liable. The property and goods thus assigned have been sold, and, after deducting the expenses of sale, the amount is not equal to the claim of Dunn and Barry.

This assignment appears to have embraced all the property of Tomlinson. The complainants are creditors of Tomlinson, and they charge in their bill that the assignment was fraudulent, and that it was also intended to prefer one class of creditors to the exclusion of others. The defendants, in their answer, deny all fraud, and claim that they took the assignment in good faith for their own security and protection.

Without going into a detail of the evidence, we would merely say that, so far as the question of fraud is concerned, we do not see that any actual fraud was intended. The evidence shows that at the time the property and goods were delivered to Dunn and Barry, Tomlinson was insolvent; that, in view of this insolvency, Dunn and Barry were very anxious to secure themselves, by getting security on his property; that their protection in this way was the sole object of the arrangement, and that they took no means to interfere with the rights of other creditors than were necessary to effect that object.

It is contended, on the part of the defendants, that the transfer of the property amounted to an absolute sale. This appears to have been the opinion of the attorney under whose directions the contract was completed. His own evidence, however, as well as 240] that of all the other witnesses, *shows clearly that the sale was a conditional one. Dunn and Barry were mortgagees in possession, with power to sell, and apply the proceeds to the payment of their claim. They had to account, for any balance that might remain, to Tomlinson; this required an account to be rendered of the entire proceeds of the property, that is altogether inconsistent with their being in any sense the absolute owners of it.

This brings us to the main question in the case, which is, Does this case fall within the provisions of the statute of 1838, relating to assignments by debtors, in view of insolvency, to trustees? If it does come within that statute, then the complainants, as well as

the other creditors, have a right to a *pro rata* distribution of the fund arising from the sale of this property ; if not, then they have no such right, but Dunn and Barry are entitled to have their claim paid in full out of the fund. For it is to be observed that it is only by force of statute law that any objection can be taken to an insolvent's paying off a portion of his debts, or securing one or more of his creditors, although such payment, or the giving of such security, will enable one class of creditors to obtain an advantage over another. We have always had a statute in this state making all contracts void that were made for the purpose of defrauding, delaying, or hindering creditors ; and such contracts have always been void at common law, without any statutory enactment. But even under the statute of 1835, which enacted that all assignments of property hereafter made by debtors to trustees in consideration of insolvency, and with design to secure one class of creditors and defraud others, should inure to the benefit of all the creditors, it was held, in the case of *Hull v. Jeffrey*, 8 Ohio, 290, that the right to prefer one creditor to another still existed, provided the assignment was made in good faith. And we believe that it has been universally held, in the absence of any statutory provision to the contrary, that voluntary assignments, made *bona fide* by debtors to trustees for the benefit of creditors, will be supported, though preference is given to part of the creditors, *in exclusion of the [241 rest. *United States' Digest*, 258, and the cases there cited.

The statute of 1838 has changed the general rule of law on this subject, not by declaring such assignments void, but by directing that property thus assigned shall inure to the benefit of all the creditors, without reference to the preference provided for in the assignment ; and this, although the assignment may have been made in good faith.

That statute provides, "That all assignments of property in trust which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors, to the exclusion of others, shall be held to inure to the benefit of all the creditors, in proportion to their respective demands." *Swan's Stat.* 717.

Does this statute, then, apply to the case of a creditor taking a mortgage or other security for his debt on the property of his insolvent debtor ? On the part of complainants, it is contended that it does, and we are referred to the case of *Mitchell v. Gazzam*, 12

Ohio, 315, as a decision in point. That decision, we are bound to admit, sustains the proposition, which leaves the single question for consideration, whether the decision is in accordance with law. In the first place, we would say, that the language of the statute of 1838 would not strictly apply to a case like the present, that of a creditor taking an assignment of property to secure a debt of his own; where that is the sole object of the transaction, and where the relation of mortgagor and mortgagee is created between the parties. The language of the statute is very explicit, and its operation limited by a number of descriptive and qualifying terms. It must be a conveyance in trust, which is made to trustees, with the design to prefer one or more creditors, to the exclusion of others, etc. Now, this is not the language by which we would expect any one, either in common or legal parlance, to describe the fact of a creditor taking security from his debtor. The language here would certainly be a very awkward mode of expressing such a transaction. 242] If the legislature had *intended to bring such transactions within the statute, they would certainly have expressed it by providing, in addition, that all securities given in view of insolvency should come within its provisions. But the transaction described in this statute is one that conveys to the mind a very definite idea, wholly distinct from the fact that the person to whom the conveyance is made is a creditor.

The court, in the case of *Hall v. Jeffrey*, to which we have before referred, in speaking of the statutes of 1835, and this statute, speak of the evil that this legislation was intended to prevent. They say: "During the commercial embarrassment a few years since, debtors, in view of insolvency, adopted the plan of assignments to trustees, either to create inconvenient embarrassments upon pursuit of debts, or to preserve their property from a compulsory sale, or to impose terms upon creditors, or to secure some other profitable result to themselves. Examples of these practices may be found in 6 Ohio, 293; 7 Ohio, pt. 2, 246." The court further say, after referring to the provisions of the statutes of 1835 and 1838, conveyances, other than those made to trustees, are not affected by either statute. Making an assignment to trustees to pay debts is one thing; securing a debt is another and a very different thing. But it is said in *Mitchell v. Gazzam*, 12 Ohio, 335, that the object of the statute of 1838 was to cut off preferences by debtors in failing or insolvent circumstances of favored creditors, and to secure

a fair distribution to all the creditors, in proportion to their respective demands, and that the statute would be liberally construed to effect that object.

Now, it might be very desirable to have the effects of an insolvent debtor divided amongst his creditors *pro rata*, without permitting any preference or advantage to be obtained amongst them. But we think the statute falls very far short of effecting or attempting to effect that object. To accomplish this, it would be necessary, after the fact of insolvency existed, to prevent the debtor from making a sale of his property in payment of a debt; to prevent a creditor from taking advantage of a judgment by execution; or from taking a judgment by confession; to prevent the [243] debtor from selling his property and paying off any of his debts; in all these ways the equal distribution of a debtor's effects may be prevented as effectually as by securing a debt by an assignment of property to the creditor. And yet no one has ever contended that the statute ever applied to any of the above cases. Indeed, since the decision of *Mitchell v. Gazzam*, it has been a very common practice, in place of taking security on the property of a failing debtor, to have the debtor confess a judgment, and upon execution appropriate his property to the payment of such judgment. If the legislature intended, by the statute of 1838, to insure an equal distribution of the effects of an insolvent debtor amongst his creditors, under the most liberal construction that can be given to it they have fallen far short of effecting that object. Now, it may be said that a mortgagee is in some respects a trustee; but this arises merely as an incident to his relation as mortgagee, and is not the kind of trustee designated in the statute. We suppose that the legislature, as the language imports, intended to provide for a case where a trustee is interposed, with the controlling intent on the part of the debtor, of giving one creditor an advantage over another, and that the statute does not apply to the case of a creditor seeking and obtaining, in good faith, a lien on the property of his insolvent debtor for the sole purpose of securing his debt. So far as the case of *Mitchell v. Gazzam* holds differently, that decision is not sustained by law.

Now, in the present case, the defendants were the sureties of Tomlinson; they took an assignment of about enough property to pay off their liabilities for him; and, although they showed themselves very anxious to obtain the security, as all men would be

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under similar circumstances, yet securing themselves appears to have been their sole object; and we think they had a legal right to do it.

This doctrine is expressly laid down in the case of *Fassett v. Traber*, 20 Ohio, 540; and in *Doremus v. O'Harra*, ante 45. The bill will be dismissed.

Bill dismissed.

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In case of a regular deposit of wheat with a warehouseman, which requires of the depositary the use of ordinary diligence in taking care of the wheat, and a re-delivery of the same on demand, to the depositor, on being paid a reasonable compensation for his services, the warehouseman would be liable to the depositor for the value of the wheat in case he mixes it with other wheat in his warehouse, and ships the same for sale on his own account, notwithstanding he may supply the place of the depositor's wheat by other wheat procured and deposited in his warehouse; and the destruction, by accident, of the warehouse, and the wheat supplied to take the place of the depositor's wheat, will not protect the warehouseman from liability to the owner.

In case of an irregular deposit or mutuum, where the obligation imposed upon the depositary or mutuary, is to re-deliver, not the specific thing furnished, but another article of the same kind and value; or, where the depositary has the option to return the *specific article* received, or another of the *same kind and value*, in either case the property passes to the depositary as fully as in a case of ordinary sale or exchange; and the risk of loss by accident follows the control or dominion over the property.

Where a warehouseman receives wheat, and by the consent of the owner, or in accordance with the custom of trade, mixes the wheat in a common mass with the other wheat in his warehouse, and with the understanding that he is to retain or ship the same for sale on his own account, at pleasure, and, on presentation of the warehouse receipt, is either to pay the market price thereof in money, or re-deliver the wheat, or other wheat in place of it, the transaction is not a bailment, but a sale, and the property passes to the depositary, and carries with it the risk of loss by accident.

Where the court of common pleas declined to charge the jury as requested by the defendant, in regard to a matter in which the compliance of the court with the request could not have aided the defense, such refusal of the court constitutes no ground of error for the reversal of the judgment.

ERROR to the common pleas reserved in the district court of Huron county for decision by the supreme court.

The original action was *assumpsit*, in which the plaintiff, Washburn, sought to recover the value of a quantity of wheat, which had been delivered by him to the defendants, Chase & Co., as warehousemen, engaged in the produce business at the village of Milan, in said county.

It appears from the bill of exceptions taken in the case, that on the trial of the cause in the common pleas, Washburn offered in evidence sundry warehouse receipts given *him by Chase [245 & Co. for wheat delivered at various times, between the month of October, 1847, and the month of August, 1849, amounting in the aggregate to six hundred bushels and more. The receipts are similar in form and effect, and the first in date, which may be taken as a sample of the others, is as follows:

“MILAN, O., November 5, 1847.

Received in store from J. C. Washburn (by son), the following articles, to wit: Thirty bushels of wheat.

H. CHASE & Co.”

It further appears that the agent of Washburn was introduced as a witness, who testified that he had been instructed by Washburn, the defendant in error, when he delivered the first load of the wheat, not to sell the wheat for less than one dollar per bushel, and, if he could not get that, to leave it in store with Chase & Co., the plaintiffs in error, and that he told Chase that Washburn had five or six hundred bushels to draw, and that Chase at the time told the agent, when he left the first load, that they (Chase & Co.), would pay the highest price when Washburn should call for it. The wheat was accordingly from time to time delivered, and in May, 1850, a demand was made for either the wheat or the money, and both refused.

Chase then offered evidence tending to prove that his warehouse was burnt on the night of the 26th of October, 1849, and that there was then consumed in it sufficient wheat to answer all his outstanding receipts. He also offered evidence tending to prove that the custom at Milan was to store all wheat received in a common mass and to ship from the same as occasion required, and that this custom was understood by Washburn; also that the custom was, when parties called for their pay, either to pay the highest market price, or deliver wheat to the holder of the receipts.

Washburn then offered rebutting evidence, tending to prove that Chase had not sufficient wheat in his warehouse, at the time of the

fire, to answer all his outstanding receipts, and also that the warehouse was emptied of all wheat between the date of the last receipt given Washburn and the time of the fire.

246] *Upon this state of facts the counsel for Chase asked the court to charge the jury, "that the customs at Milan, if known to Washburn, in the absence of an express contract, became a part of the contract between the parties, and if the jury should find that Chase had sufficient wheat on hand at the time of the fire to answer all his outstanding receipts, that he was not liable in this action, and that neither the mingling of the wheat nor the shipment of it would make Chase liable, if he had a sufficient amount on hand at the time of the fire to answer his outstanding receipts."

The court, however, refused to charge as requested. The bill of exceptions sets out the charge of the court in full, to which the counsel for the defendants below excepted. The verdict and judgment was in favor of the plaintiff below, to reverse which this writ of error is brought.

It is alleged for error, that the court of common pleas erred in their charge as follows, to wit:

1. Because that court charged the jury, "that if they should find that the wheat was received and put in mass with other wheat of defendant and that received of other persons, with the understanding that the wheat was to be at the disposal of the defendant, either to retain or to ship it, and with the agreement that, when the receipts were presented, the defendant would either pay the market price therefor, or re-deliver the wheat or other wheat equal in amount and quality: then; if the jury should further find that the wheat thus left prior to the fire had all been shipped and disposed of, the defendant can not be excused unless there was an agreement between the parties that the wheat subsequently purchased by defendant was to be substituted in place of that left by plaintiff, and to be his property."

2. Because the court charged the jury "that where a warehouseman receives grain on deposit, with an understanding that he may if he choose dispose of it, and that he will, when demanded, return other grain or pay for it, in case of such a disposition he is bound to do the one or the other. A subsequent purchase of grain 247] by the warehouseman, for *the purpose of meeting the demand for grain thus received, would not be sufficient to vest the property in the plaintiff."

3. Because that court refused to charge the jury that the custom at Milan, as proved by defendants, if known to plaintiff, was a part of the contract between the parties.

Osborne & Taylor, for plaintiff.

Worcester & Pennewell, for defendant.

BARTLEY, J. To determine which of the parties in this case shall sustain the loss of the property in question occasioned by the accident, it becomes necessary to ascertain the true nature and character of the transaction between them, and the rights created and duties imposed thereby. It was either a contract of sale, a mutuum, or a deposit. If a contract of sale, the right of property passed to the purchaser on delivery, and the article was thereafter held by him at his own risk. If a mutuum, the absolute property passed to the mutuary, it being a delivery to him for consumption or appropriation to his own use; he being bound to restore not the same thing, but other things of the same kind. Thus, it is held, that if corn, wine, money, or any other thing which is not intended to be delivered back, but only an equivalent in kind, be lost or destroyed by accident, it is the loss of the borrower or mutuary; for it is his property, inasmuch as he received it for his own consumption or use, on condition that he restore the equivalent in kind. And in this class of cases, the general rule is, *ejus est periculum, cujus est dominium*. Story on Bailments, sec. 283; Jones on Bailments, 64; 2 Ld. Raym. 916. But if the transaction here was a deposit, the property remained in the bailor, and was held by the bailee at the risk of the bailor, so long as he observed the terms of the contract in so doing. But if the bailee shipped the wheat, and appropriated the same to his own use, in violation of the terms of the bailment, before the burning of his warehouse, he became liable to the bailor for the value of the property.

What then was the real character of the transaction between the parties? The receipt I suppose to be in the ordinary form of [248] warehouse receipts, and such as would be proper to be delivered by a warehouse depositary of wheat to the owner upon its being received into a warehouse for temporary safe-keeping, and to be re-delivered to the owner on demand. The obligation or contract which the law would imply as against the warehouseman on the face of such a receipt would be that he should use due diligence in the care of the property, and that he should re-deliver it to the

owner or to his order on demand, upon being paid a reasonable compensation for his services; and if the warehouseman, under such circumstances, should, without the consent of the owner, mix the wheat with other wheat belonging to himself or other persons, and ship the same to market for sale, he would be liable to the owner for the value of the wheat thus deposited with him.

The receipts themselves are silent as to the *time* the wheat was to be kept, the *price* to be paid for its custody, *when* or *how* to be paid, *whose property* it was to be after delivery into the warehouse, and what disposition was to be made of it. But it is claimed that inasmuch as written receipts, whether for money or other property, are always subject to explanation by parol, that the terms on which this wheat was delivered can be explained by the declarations of the parties at the time of the delivery of the first load of wheat, and also by the custom of trade which prevailed among warehousemen at Milan; and that by such explanation it is shown that the real transaction was that the wheat was received, and, with the consent of the depositor, put in mass with other wheat of the warehouseman and that received of other persons, with the understanding that the wheat was to be at the disposal of the warehouseman, either to retain or ship it, and that when the receipts should be presented by the depositor, the warehouseman should either pay the market price therefor, or re-deliver the wheat, or deliver other wheat equal in amount and quality.

If these terms were incorporated into the contract, they could not have excused the liability of the warehouseman in this case. 249] The distinction between an irregular deposit *or a *mutuum* and a sale is sometimes drawn with great nicety, but it is clearly marked, and has been settled by high authority. In case of a regular deposit, the bailee is bound to return the specific article deposited; but where the depositary is to return another article of the same kind and value, or has an option to return the specific article, or another of the same kind and value, it is an irregular deposit or *mutuum*, and passes the property as fully as a case of ordinary sale or exchange. Sir William Jones says: "It may be proper to mention the distinction between an obligation to restore the *specific things*, and a *power* or *necessity* of *returning others of equal value*. In the first case it is a regular bailment; in the second it becomes a debt." In the latter case he considers the whole property transferred.

Judge Story, in his commentaries on the law of bailment, says: "The distinction between the obligation to restore the specific things, and the obligation to restore other things of the like kind and equal in value, holds in cases of hiring, as well as in cases of deposits and gratuitous loans. In the former cases, it is a regular bailment; in the latter, it becomes a debt or innominate contract. Thus, according to the famous laws of Alfenus, in the Digest, 'if an ingot of silver is delivered to a silversmith to make an urn, the whole property is transferred, and the employee is only a creditor of metal equally valuable, which the workman engages to pay in a certain shape, unless it is agreed that the specific silver, and none other, shall be wrought up in the urn.'" Story on Bailments, sec. 439.

In all this class of cases, the risk of loss by unavoidable accident attaches to the person who takes the control or dominion over the property. When, therefore, Washburn's wheat was delivered to Chase & Co., and became subject to their disposal, either to retain, or to ship it on their own account, the property passed, and the risk of loss by accident followed the dominion over it.

The doctrine here adopted was at one time somewhat obscured by the opinion of Chief Justice Spencer, in the case of *Seymour v. Brown*, 19 Johns. 44, in which the court decided that where the plaintiff delivered wheat to the defendants, on the agreement that for every five bushels of wheat the plaintiffs should deliver at the defendants' mill, they, the defendants, would deliver in exchange one barrel of flour, was a bailment, *locatio operis faciendi*; and the wheat having been consumed by fire, through accident, the defendants were not liable on their agreement to deliver the flour. This decision, however, was disapproved of by Chancellor Kent, as not being conformable to the true and settled doctrine laid down by Sir William Jones, who has been styled the great oracle of the law of bailment: 2 Kent's Com. 464. And the decision has been distinctly overruled by repeated subsequent adjudications in the State of New York: *Hurd v. West*, 7 Cow. 752; *Smith v. Clark*, 21 Wend. 83; *Norton v. Woodruff*, 2 Comst. 153; *Mallory v. Willis*, 4 Comst. 77; and *Pierce v. Skencck*, 3 Hill, 28.

The same doctrine has been affirmed in the case of *Baker v. Roberts*, 8 Greenl. 101, and also *Ewing v. French*, 1 Blackf. 354. In the latter case, a quantity of wheat having been delivered by the plaintiff to the defendants, at their mill, to be exchanged for

flour, and the defendants having put the wheat into their common stock of wheat, the mill, with the wheat, was afterwards casually destroyed by fire. The court held that the defendants were liable for a refusal to deliver the flour. If in that case the agreement of the parties had been that the flour to be furnished should be the flour which should be manufactured from the specific wheat delivered, instead of an exchange of wheat for flour, it would have been a bailment, and the loss would have fallen upon the plaintiff.

In the case of *Buffum v. Merry*, 3 Mason, 478, where the plaintiff had delivered to the defendant cotton yarn on a contract to manufacture the same into cotton plaids, and the defendant was to find filling, and to weave so many yards of plaids, at eighteen cents per yard, as was equal to the value of the yarn at sixty-five cents per 251] pound, it was held to be a *sale of the yarn; and that, by the delivery of it to the defendant, it became his property, and he was responsible for the delivery of the plaid, notwithstanding the loss of the yarn by an accidental fire. But had the plaintiff and the defendant agreed to have the particular yarn, with filling to be found by the defendant, made into plaids on joint account, and the plaids, when woven, were to be divided according to their respective interests in the value of the materials, but, before the division, the plaids had been destroyed by accident, the loss, in the opinion of Judge Story, would have been mutual, each losing the materials furnished by himself.

The case of *Slaughter v. Green*, 1 Rand. 3, and also the case of *Inglebright v. Hammond*, 19 Ohio, 337, are relied upon as sustaining the plaintiffs in error. These two cases, on examination, do not sustain the doctrine of the case of *Seymours v. Brown*, above referred to in 19 Johns. On the contrary, instead of an exchange of wheat for flour, in each of the cases, by the express terms of the contract, the flour to be returned was to be manufactured out of the wheat furnished. In the former case, the written receipts given for the wheat expressly provided, "*that it is received to be ground,*" which excludes the idea of passing the ownership to the miller. And in the latter case it was also expressly provided by the agreement that the flour in controversy was "*to be made out of the wheat furnished by Hammond,*" and "*the flour made therefrom was to be delivered at Steubenville for said Hammond's use.*" In both these cases, therefore, the limitation in the agreement of the parties imported a bailment, and not an exchange for flour. And this character of

the transaction is not lost either because the custom of the country in reference to which the wheat was received warranted the mixing of it with the wheat of others, received on like terms; or because, by the express consent of the parties, the wheat was mixed with other wheat in the mill, belonging to the miller himself. When the owners of wheat consent to have their wheat, when delivered at a mill or warehouse, mixed with a common mass, each becomes the owner *in common with others, of his respective share [252 in the common stock. And this would not give the bailee any control over the property which he would not have if the wheat of each one was kept separate and apart. If the wheat, thus thrown into a common mass, be delivered for the purpose of being converted into flour, each owner will be entitled to the flour manufactured from his proper quantity or proportion in the common stock. If a part of the wheat held in common belong to the bailee himself, he could not abstract from the common stock any more than his own appropriate share without a violation of the terms of the bailment; and such a breach of his engagement could not be cured by his procuring other wheat, to be delivered to supply the place of that thus wrongfully taken. But if the wheat be thrown into the common heap, with the understanding or agreement that the person receiving it may take from it at pleasure and appropriate the same to the use of himself or others, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depositary, and the transaction is a sale and not a bailment.

It is claimed that the court of common pleas erred in refusing to charge the jury, as requested. "that the custom among warehousemen at Milan, in the absence of an express contract, if known to Washburn, became a part of the contract."

A custom, it is true, is not admissible, either to contradict or alter the terms or legal import of a contract or to change the title to property by varying a general rule of law. But a custom, when fully established, becomes the law of the trade in reference to which it exists; and the presumption is that the parties intended to conform to it, when they have been silent on the subject. Its office is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contract, arising not from express stipulations, but from mere implications and presumptions, and of acts of doubtful and equivocal charac-

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ter. I am not prepared to say that the *customs at Milan*, if 253] *fully established, and known to both the parties to the contract for the delivery of wheat to a warehouseman, may not be regarded as law, as well as the customs of London or of Kent. But, unfortunately for the plaintiffs in error, the customs of Milan, as the evidence tended to prove, according to the bill of exceptions, very clearly showed the transaction between the parties in this case to be a contract of sale, and not a bailment. Had the court, therefore, charged as requested upon this point, it could not have aided the defense set up against the action. So that if the court did err in this particular, no injury was therefore done to the plaintiffs in error.

Judgment affirmed.

NATHAN W. PALMER v. JOSEPH A. YARRINGTON.

Under the plea of non-assumpsit, without affidavit, a defendant may give evidence to disprove the execution of the note on which suit is brought.

The words "I hereby give J. W. Abell the liberty of making use of my name, if it will be of any use to him with his friends in Connecticut, to the amount of one thousand or fifteen hundred dollars, to borrow money. N. W. Palmer," are not a mere guaranty for the amount named, but confer a power upon J. W. Abell to sign the name of Palmer to a note for the money borrowed.

Such power does not authorize a loan by J. W. Abell, as agent, to or for the use of any other person.

The validity of a note given in Connecticut is to be determined by the laws of that state, under which any contract reserving more than six per centum interest per annum is absolutely void.

An exception to the judgment of a court below ruling out evidence can not be considered, unless such evidence is spread upon the record.

The reasons assigned by a court for its judgment are material, if the record show that such judgment was, in fact, correct.

THIS is a writ of error to the supreme court in Trumbull county, allowed by the late supreme court in bank.

254] *The original action in the common pleas was assumpsit, brought by Yarrington against Palmer on the following note:

"NORWICH, April 1, 1845.

"On demand, for value received, we, the subscribers, jointly and

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severally promise to pay Joseph A. Yarrington fifteen hundred dollars, with interest.

JOHN ABELL.

N. W. PALMER.

J. W. ABELL."

"Indorsed: J. W. Abell."

The declaration contained a special count on the note, and also the money counts. The plea was non-assumpsit without affidavit.

Upon the trial of the cause, which was to the court without the intervention of a jury, the plaintiff gave the note in evidence and rested.

The defendant thereupon offered John W. Abell as a witness, who testified:

That, on the first of April, 1845, in Norwich, Connecticut, he made arrangements with Yarrington, who was his uncle, and who resided in Connecticut, to procure \$1500, and gave him the note sued on. Yarrington then made his own note for a like sum, payable some months after date at the Quinneburg Bank to the witness; and it was by him indorsed. Upon this he procured the fifteen hundred dollars, less the discount, from the bank.

The witness offered Yarrington fifty dollars for the accommodation, which was received by Yarrington, who said he dare not take it for this accommodation, but "he would call it for what he had done before." This transaction was on the same day of the making of the notes and of the receipt of the money from the bank; but whether before or after, does not appear.

This money, the witness states, belonged to his father. That it was paid on account of this accommodation of \$1500. That Yarrington had been paid all former expenses, and that "he made no pretense of having any claim for any previous accommodation, and had no such claim."

*The witness had frequently before this, procured money [255 for his father, John Abell, from Yarrington, who was a stockholder in the Quinneburg Bank, and Yarrington was informed at this time that the money was for the use of John Abell, and it was applied to the payment of his debts in New York and Philadelphia.

He also testified that the note given in evidence was made by him in Norwich; that he signed all the names, and that John Abell and Palmer, the defendant, were not present.

Upon cross-examination, he stated that he had with him and ex-

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hibited to Yarrington the following paper, which had been written, signed, and delivered to witness by Palmer, in Ohio:

"WARREN, MARCH 14, 1845.

"I hereby give J. W. Abell the liberty of making use of my name, if it will be of any use to him, with his friends in Connecticut, to the amount of a thousand or fifteen hundred dollars, to borrow money.
N. W. PALMER."

At the time he received this he had contemplated speculating in wool and raising money for that purpose. He had no other authority from Palmer to make use of his name than this paper nor did he, upon his return to Ohio, inform Palmer that he had made use of his name. There was no evidence that Palmer had any knowledge that his name had been signed to the note until it was sent to Ohio a year afterwards for collection.

The defendant also made proof of the law of Connecticut, from "an act to restrain the taking of usury," as follows:

"Sec. 1. That no person or persons, upon any contract, shall take, directly or indirectly, for the loan of money or any goods, wares, or merchandise, or any property whatever, above the value of six dollars for the forbearance of one hundred dollars for a year, and so after that rate for a greater or less sum, or for a longer or shorter time; and all bonds, contracts, mortgages, and assurances whatever, made for the payment of any principal or money 256] lent, or covenanted to be *lent, upon or for usury, whereupon or whereby there shall be reserved or taken above the rate of six dollars for the hundred, as aforesaid, shall be utterly void.

"Sec. 2. Every person who shall take, accept, and receive, by means of a corrupt bargain, loan, or exchange, or deceitful conveyance, or by any other means, for the forbearance, or giving day of payment for a year of and for money or any other property above the sum of six dollars, for the forbearance of one hundred dollars for a year, and after that rate for a greater or less sum, or for a longer or shorter time, shall forfeit the value of the money or other property so lent, bargained, sold, or agreed for, one-half to him who shall prosecute to effect, and the other half to the treasurer of state.

"Sec. 3. And in any action brought on any bond, bill, or mortgage, or any contract whatever, it shall be lawful for the defendant to inform the court before which the action is pending, by filing his complaint with the clerk on the second day of the session of

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the court, that such contract was given on a usurious consideration; and in that case the court shall proceed to enquire into the truth of such complaint, as a court of equity, and may examine the parties on oath, and may receive any other proper testimony; and if the plaintiff shall refuse to be examined on oath, he shall become *non suit*, and the defendant shall recover his costs. And if the court shall find that the contract was given upon usurious consideration, they shall proceed to adjust the same in equity, and shall give judgment for the plaintiff to receive no more than the value of the goods, or the principal sum of money which the defendant received, without 'interest or any advance on the same.' "

The plaintiff then gave in evidence the deposition of the cashier of the Quinneburg Bank, to prove payments by Yarrington of \$44.83 on account of expenses, protests, and discounts, for renewals of previous notes of Yarrington on account of Abell. He also proves the deposit of money, at different times, by Yarrington, which he said had been received from Abell.

*He also offered certain letters of J. W. Abell to Yarrington- [257 ton, in evidence, which were objected to, and the objection sustained; but the letters were not set out or made part of the bill of exceptions.

The court of common pleas rendered judgment for the defendant. A motion to set aside the judgment and for a new trial was made by Yarrington, the plaintiff, which was overruled by the court, and a bill of exceptions, setting out the testimony, was taken.

Yarrington then prosecuted a writ of error to the common pleas in the supreme court of Trumbull county. At the August term, 1850, of the supreme court on the circuit, the judgment of the court of common pleas was reversed; and to reverse this judgment of the supreme court, the present writ of error is brought.

Ranney & Taylor, for plaintiff in error.

Tuttle & Sutliff, for defendant in error.

CORWIN, J. It is proper, in the first place, to notice the proposition of counsel for defendant in error, that, unless the plea of non-assumpsit be verified by affidavit, the party can not introduce evidence to disprove the execution of the note.

By the first section of "An act to amend an act entitled 'An act dispensing with proof in certain cases,' " passed March 9, 1838, it is provided:

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"That upon plea of *non est factum*, offered by the person charged as the obligor or grantor of a deed, or plea of *non assumpsit*, or *nihil debet*, offered by the person charged as the maker or indorser of any promissory note, or drawer, indorser, or acceptor of any bill of exchange, it shall not be necessary for the plaintiff to prove the execution of the deed, the making of the note, or the drawing or accepting the bill of exchange, upon which such suit is brought, or any indorsement thereon, unless the party offering such plea shall make affidavit of the truth thereof, or that any such indorsement 258] *was not made as it purports to have been, etc." Swan's Stat. 325.

Under the provisions of this statute, as construed in the case of Taylor's Adm'rs v. Colvin, Wright, 449, it is claimed the court of common pleas erred in permitting the defendant in this case, under the plea of *non assumpsit*, without affidavit, to disprove the execution of the note upon which the suit is brought. It is said that unless the construction of this statute adopted in Wright's Reports is adhered to, the plaintiff has no notice of such defense, and is taken by surprise, whereas, if the execution of the note were denied by the affidavit of the party, he would prepare himself to rebut the evidence introduced under the plea. But how is this practically? The statute does not require the party to make affidavit denying the execution of the note; but "that the party offering such plea shall make affidavit of the truth thereof." Now suppose the party to have made affidavit of the truth of his plea of *non assumpsit*, it certainly furnishes no further notice of this defense than is furnished by the plea itself, and still the provisions of the statute would have been strictly complied with. Under the plea of *non assumpsit*, which originally raised only the question whether the liability charged had, in fact, ever been contracted, it is now well settled that a party may give in evidence anything which tends to defeat or limit the right of recovery against him at the time of the trial. Of no one of which defenses, the plaintiff could be any more particularly advised by appending the affidavit provided for in the act before referred to. This objection lies rather to the character of the plea itself—to all pleas of the general issue—than to the want of an affidavit, and furnishes a most insufficient and unsatisfactory reason for adopting the construction contended for.

At common law, and without the act referred to, the plaintiff, upon offering his note in evidence, must prove its execution; and

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this statute, as its title implies, merely dispenses with such proof, unless the plea which puts its execution in issue is verified by affidavit, and makes no other or further *change in the rules of [259 evidence; so that, although, since the statute, a party may offer his note in evidence without proof of its execution, yet he offers it just as he offers any other item of evidence—liable to be met and defeated by such evidence as the defendant may be able to produce. We are all of opinion that the act in question was misconstrued in the case of *Taylor's Adm'rs v. Colvin*, and that the court of common pleas did not err in admitting the evidence under the plea, without affidavit. It being made to appear, by the evidence thus introduced, that the note upon which the suit is brought was executed at Norwich, Connecticut, by John W. Abell, the next question arising in the case is as to the authority of said Abell to sign the name of Palmer to the note, which authority is to be derived solely from the following paper, to wit:

“WARREN, March 14, 1845.

“I hereby give J. W. Abell the liberty of making use of my name, if it will be of any use to him with his friends in Connecticut, to the amount of a thousand or fifteen hundred dollars, to borrow money.
N. W. PALMER.”

This paper should be “construed in the light of all the surrounding circumstances which induced its execution, as well as with a reference to the condition and situation of the parties.” *Hilderbrand v. Fogle*, 20 Ohio, 147. J. W. Abell was the brother-in-law of Palmer, about to make a trip to the east, contemplating some transactions in the wool trade, as he testifies, and Palmer doubtless intended to do what he had done by the express terms of his written authority, giving “J. W. Abell the liberty to make use of his name, if it would be of any use to him, with his friends in Connecticut, to borrow money, to the amount limited in the writing.” And inasmuch as the name of Palmer, in the ordinary course of business, could not be used without signing it to the paper by which the transaction was to be evidenced, we think it clear that the right to use the name to borrow money at a place distant from the residence of the party conferring the right, involved the right to sign such *name to a note for the payment of the money bor- [260 rowed. Without any strained construction, and by the obvious import and effect of the words employed, a power was given to J. W. Abell to sign the name.

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The court of common pleas, in reciting upon the record, as a reason for the decision, that the paper above quoted was merely a guaranty, and created no powers, expressed an erroneous opinion; but the reasons given by the court for its judgment are immaterial, if the record shows that the judgment was, in fact, correct.

It is well settled that a guarantor or surety can only be held by the strict terms of the obligation into which he has entered. If not within the letter, he can not, by implication or otherwise, be made liable; *New Haven Co. Bank v. Mitchell*, 15 Conn. 206; *Field v. Rawlings*, 1 Gil. 581; *Walsh v. Bailes*, 10 Ind. 180; *Miller v. Stewart*, 4 Wash. C. C. 26; *Bank of Washington v. Bennington*, 2 Penn. 27; *Blair v. Perpetual Ins. Co.*, 15 Miss. 559; *The State v. Medary et al.*, 17 Ohio, 565; *McGovney v. Ohio*, 20 Ohio, 93.

Considering the paper as a *power*, in the opinion of a majority of the court, it only authorized the use of Palmer's name to secure a loan to John W. Abell. It did not warrant the use of his name to secure the payment of a loan made to or for the use of any other person. Yarrington knew that the name of Palmer was signed to the note which he took, by John W. Abell, in the absence of Palmer; and even if the paper conferring the power had not been exhibited to him, he is held to know the extent of the power which the agent had. But it is shown that the paper was in fact exhibited to him by John W. Abell, and he can not claim that any further authority was thereby conferred than is warranted by a fair construction of its terms. He was bound to know its legal effect, and therefore must have known that it did not authorize John W. Abell to sign the name of Palmer to the note in question, given to secure a loan to, or for the use of John Abell. *Story's Agency*, sec. 72.

261] *With this view of the case, it is not necessary to notice at length the defense of usury under the statute of Connecticut, hereinbefore recited. It is true, however, that the validity of a contract is to be determined by the law of the place where made; and if void by those laws, it is void everywhere. We are all satisfied, from the evidence spread upon the record, that the contract was usurious, both as to the sum of \$50 paid to Yarrington at the time for the accommodation, and as to the amount of interest accruing on this note, from its date to the maturity of the note given by Yarrington to the bank upon which the money was drawn. And, in the absence of any construction of the statute of Connecticut for the prevention of usury by the courts of that state, we would have no-

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difficulty in holding that, under the provisions of the first section of said statute, the contract upon which this loan was made was absolutely void. Although, under the third section of said act, the party borrowing the money, if he is obliged to have discovery from the other party in order to show usury, will be compelled, upon principles of equity, to pay back the amount of money which he had received, without any interest, yet the note given upon such usurious loan is absolutely void; and no liability can attach to a surety on such note, either at law or in equity. So it has been held by the courts of that state; and that the defense of usury may well be made under a plea of general issue. *Culver v. Robinson*, 3 Day, 68; *Smith v. Beach*, Id. 268; *Mitchell v. Preston*, 5 Day, 100.

The bill of exceptions in this case also shows that the court of common pleas ruled out certain letters of John W. Abell, which were offered in evidence by the plaintiff, for the purpose of impeaching him as a witness. The letters may have been material and proper for that purpose; but the evidence thus rejected is not made part of the bill of exceptions; and we have no means of determining whether they were properly or improperly rejected. The presumption is always in favor of the decision sought to be reversed, and error will not be presumed, but must be made to appear. *Notwithstanding the court of common pleas may [262 have assigned an untenable reason for its conclusion, this record shows that a complete and perfect defense to the action was presented, and that the judgment of said court was substantially correct; and the judgment of the supreme court reversing said judgment of the court of common pleas is therefore reversed with costs, and the judgment of the court of common pleas is affirmed.

RANNEY, J., having been of counsel, did not sit in this case.

WILLIAM GOUDY, ADMINISTRATOR OF JACOB GEBHART v. OSEA
GEBHART.

No action will lie by obligee against obligor on a bond, the consideration of which is a sale made by the former to the latter to defraud creditors; both of them having been guilty of the fraudulent intent.

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In such a cause, the proof of the fraud may come from the defendant. The rule is that no one is allowed to set up his own iniquity to defeat an innocent person. But where the parties are *participes criminis*, the fraud may be proved by the defendant.

THIS is a writ of error to the court of common pleas of Montgomery county, and reserved by the district court in that county for decision in this court.

Lowe, Forsyth & Booth, for plaintiff in error: 4 Ohio, 419; 7 Ohio, pt. 1, 77; 14 Ohio, 56; 16 Ohio, 56; *Holman v. Johnson*, Cooper, 343; *Lowry v. Bordiew*, Dougl. 468; *Morck v. Abel*, 3 Bos. & P. 35; *Russell v. DeGrand*, 15 Mass. 39; *Hunt v. Knickerbocker*, 5 Johns. 327; *Wheeler v. Russell*, 17 Mass. 281; 4 Greenl. 415; 7 Conn. 399; 1 Fairfield, 71; and *Willis v. Clark*, 20 Wend. 24.

M. B. Walker, for defendant in error: *Findley v. Cooley*, 1 Blackf. 262; 5 Kinney, 109; 3 Watts & S. 255; 16 Johns. 189; 4 Ired. 102; 263] 22 Pick. *253; 2 Bibb. 89; Id. 65; 3 Mason, 378; 1 Humph. 466; 1 Ohio, 469; 18 Ohio, 418; 20 Ohio, 389; 5 Ala. 192; 6 Shep. 231; Id. 400; 10 Id. 35.

THURMAN, J. The action below was debt on a single bill obligatory executed by the intestate, Jacob Gebhart, to said Osea Gebhart; plea, *non est factum*, with a notice. On a trial by jury Osea Gebhart, the plaintiff below, gave the single bill in evidence and rested. The administrator, defendant below, thereupon gave evidence tending to prove that the obligation was executed by Jacob as the consideration, or pretended consideration, of a sham sale of Osea's personal property to Jacob for the purpose of placing the same beyond the reach of Osea's creditors. The testimony being closed the administrator asked the court to charge the jury that if they found that the obligation was given under the circumstances, and for the consideration and purpose aforesaid, the action could not be maintained, which charge the court refused to give, and, on the contrary, charged the jury, in substance, that such an agreement, though void as against the creditors of Osea, was valid as between the parties, and would constitute no bar to a recovery on the obligation. To which refusal to charge, and the charge as given, the administrator excepted, and he now assigns the same matters for error. The question is thus presented whether an action can be maintained by the obligee against the obligor, on a bond given as the consid-

eration of a sale made to defraud creditors; both of them being parties to the fraud. What is the common law on this point appears to be somewhat doubtful.

In *Findley v. Cooley*, 1 Blackf. 262, which was a suit on a promissory note, the court said: "By the common law, and the statutes Ed. 3 and Hen. 7, as well as by the statutes 13 Eliz., conveyances to defraud creditors are not absolutely void. They have always been considered binding on the parties. Whether the statute 13 Eliz. ch. 5, is merely declaratory of the common law, or an extension of its operation, is rather an unsettled question." And judgment was given for the *plaintiff. But it is to be observed that no [264 notice was taken by the counsel, or court, of the distinction between executed and executory contracts. A conveyance is an executed contract, and it is true that, as between the parties, it will not be disturbed. Such is the common law, such is the statute of Eliz., and such is our own statute as construed in *Burgett v. Burgett*, 1 Ohio, 469. But it does not follow that an executory contract, tainted with fraud, will be enforced. In equity we know it will not. The decisions are almost, or quite, uniform to this effect. In *St. John v. Benedict*, 6 Johns. Chy. 117, Chancellor Kent said: "Shall this court help a party in the performance of an agreement made on purpose to defraud creditors? The arrangement between the plaintiff and H. was confessedly made to defraud that purchaser [the purchaser at sheriff's sale,] as well as other creditors; and this court will not interfere to enforce the specific performance of a contract, iniquitous and fraudulent in its very foundation." See also *Jones v. Read*, 3 Dana, 540.

It may be said that chancery refuses relief because the party seeking it comes with impure hands? But why impure? What stains his hands? The answer is, the illegal contract he has made; the fraud he has perpetrated, or attempted to perpetrate. But why should that be deemed a fraud in a court of equity and not in a court of law? What good reason can be given for such a distinction? Why should the plaintiff be allowed to recover on this bond because it is for the payment of money, when, if it was for the conveyance of land, no chancellor would decree its specific execution? There may be fanciful reasons for such a diversity, but what solid reason can be given for it? It is true that there are circumstances of extortion, oppression, or undue advantage, which warrant a chancellor in denying his aid to the

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oppressor, that would not, if the matter could be litigated in a court of law, afford a legal defense. But I apprehend that a court of law does not, any more than a court of equity, sit to enforce agreements that are fraudulent, immoral, or against public policy. "Where-265] ever," said *Chancellor Walworth in *Bolt v. Rogers*, 3 Paige, 157, "two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct." In *Roll v. Raguet*, 4 Ohio, 419, which was an action at law on a promissory note, the defense was that the note was given as a consideration for the suppression of a criminal prosecution, and it prevailed. The court said: "We may adopt the language of Lord Mansfield, Cowp. 341, that the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, that *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."

And again the court say: "Whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties as it finds them; if the agreement be executed, the court will not rescind it; if executory, the court will not aid in its execution."

But it is urged that a sale of property is not, *per se*, either illegal, immoral, or against public policy, and that if the intent of the transaction be to defraud creditors, it is only as against them that it is illegal, immoral, etc. I confess I can not attach much weight to this refinement, which dissects a transaction and finds it very upright and laudable for one purpose and very corrupt and illegal for another. To my apprehension, the fraudulent motive is the very gist of the agreement, and taints the whole of it. A contract to build a house is, in itself, perfectly innocent; but if the house is knowingly built for an unlawful purpose the builder can not recover for his work. So it was ruled in *Spurgeon v. McElvain*, 6 Ohio, 444. The court said: "The principle is of general application, that contracts contrary to sound morals, public policy, or for-266] bidden by law, will not be executed by *courts of justice." And again, "if one intend to aid another in an illegal object, he shall not be assisted by the law."

In *Nellis v. Clark*, 20 Wend. 24, the very question under consideration was thoroughly considered, and it was held that, "where a contract is entered into for fraudulent or illegal purposes, the law refuses its aid to enable either party to disturb such parts of it as have been executed or carried into effect; and as to such parts as remain executory, it will not compel the contractor to perform his engagements, or pay damages for non-performance—thus, in both cases, leaving the parties where it finds them; and therefore, a plaintiff, chargeable with notice, is not entitled to recover in an action on a promissory note given in part consideration of a fraudulent conveyance of land." The statute of frauds of New York, in force when the above note was given, was substantially the same as that of Elizabeth, and therefore so far as the statute provided, the contract was void only as against creditors. But the court were of opinion that, at common law, and wholly independent of the statute, no action would lie on the note in favor of the payee, or an indorsee with notice—and this upon the general principle that "*ex turpi causa non oritur actio*." A similar decision was had in *Smith v. Hubbs*, 1 Fair. 71. At the same time it is not to be denied that there is very respectable authority upon the other side; but we have found no case upon the point that seems to have been so well-considered, and is so consistent with the adjudications of our courts, as *Nellis v. Clark*, above cited. We should, therefore, even if our statute of frauds was precisely similar to that of Elizabeth, come to the conclusion that the action below could not be maintained if the facts are as the testimony tended to prove them. But our statute is not in terms the same as that of Elizabeth. The latter statute only declares the corrupt agreement void as against third persons who are, or may be, injured by it. As to the parties themselves, it leaves them to the common law. But our statute is unlimited in its terms. It enacts "that every gift, grant or conveyance of lands, tenements, *rents, goods, or chattels, and [267 every bond, judgment, or execution, made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or deceive the person or persons who shall purchase such lands, tenements, hereditaments, rents, goods, or chattels, shall be deemed utterly void and of no effect." Swan's Stat. 422. If these words are taken in their ordinary literal signification, they make both executed and executory contracts void, and not only as against creditors, but also as between the parties themselves. But

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in *Burgett v. Burgett*, 1 Ohio, 469, the court held that a conveyance for the purpose of defrauding creditors is not void except against creditors or subsequent purchasers, and this decision has been followed ever since. We have no disposition whatever to disturb it. To do so might be productive of infinite mischief. But, on the other hand, we are not disposed to extend it beyond the point decided. The decision was that an executed contract, a conveyance, is good as between the parties to it, though void as to creditors. But the question whether an executory contract made to defraud creditors will be enforced as between the parties, is left untouched. It is true that some of the reasoning of the court is to the effect that our statute is, in substance, the same as that of Elizabeth, but we repeat that the decision had reference to an *executed* contract, and to no other. The same remark will apply to the cases cited from 18 Ohio, 418. *Tremper et al. v. Barton*, and *The Same v. The Heirs of Morris*. Both these were cases of executed contracts, conveyances of land. In *Brown & Co. v. Webb*, 20 Ohio, 389, also cited, the point under consideration was not involved.

Another question remains to be considered, namely, whether the defense in question is limited to cases where the facts are disclosed by the plaintiff's testimony. It is a maxim of the law, counsel say, that no one shall be permitted to aver or prove his own turpitude; and some elementary works and cases are cited where the proposition is thus stated. But an examination of the authorities [268] will show *that this statement is too broad. The true rule is that no one is allowed to set up his own iniquity to defeat an innocent person. But where the parties are *particeps criminis*, the proof may come from the defendant. See *Smith v. Hubbs*, and *Nellis v. Clark*, *supra*. The views we have expressed render it unnecessary to consider the other points made in the case. A majority of the court are of opinion that the charge to the jury was erroneous, and the judgment must therefore be reversed.

Judgment reversed.

CALDWELL, C. J., dissented.

SEATON MAYS v. THE CITY OF CINCINNATI.

By section 9 of the charter of the city of Cincinnati, the city council were required to establish and regulate the markets and market places for the sale of provisions, etc. An amendatory act prohibited them from assessing any charge upon persons bringing provisions to the markets in wagons, etc., but allowed them to prevent huckstering and forestalling.

An ordinance of the city defining a huckster to be "any person, not a farmer or butcher, who should sell, or offer for sale, any commodity not of his own produce or manufacture," and subjecting such person to a penalty, unless he had previously obtained license and paid therefor a sum fixed by council, is in conflict with said amendatory act, and void.

It was not in the power of the council, by ordinance, to include persons as hucksters who did not fall within the ordinary meaning of that term.

The power of taxation upon employment, not being conferred by the city charter, can not be exercised as a means for the prevention of huckstering.

The power of taxation being a sovereign power, can only be exercised by the general assembly when and as conferred by the constitution, and by municipal corporations only when unequivocally delegated to them by the legislative body

The sum demanded for license to pursue an employment, when used as a means of supplying the public treasury, is a tax on such employment.

The city council of Cincinnati have no power to levy such a tax.

Money paid to procure license, when issued upon the petition of the party, without objection or protest, is, in the legal sense, a voluntary payment, and can not be recovered back.

To make the payment of an illegal demand involuntary, it must be made to appear that it was made to release the person or property of the party from detention, or to prevent a seizure of either by the other party having apparent authority to do so without resorting to an action at law.

***ERROR** to the superior court of Cincinnati, reserved in [269 Hamilton county. The case appears in the opinion of the court.

Seaton, for plaintiff in error. The license is a tax. *State v. Roberts*, 11 Gill. and Johns. 506; 5 Cow. 462; 2 Story's Com. 419; the payment was not voluntary, and may be recovered back, *Cartwright v. Rowley*, 2 Esp. 723; 4 Term, 485; 1 Wend. 355; 9 Johns. 569; 17 Mass. 461.

Pugh, Attorney General, & *Ferguson*, City Solicitor, for defendant. *Cincinnati v. Buckingham*, 10 Ohio, 257; *Cincinnati v. Bryson*, 15

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Id. 625; *City of Boston v. Schaffer*, 9 Pick. 418; although the ordinance should be declared illegal and void, the payments under it were voluntary, and can not be recovered back, *Robinson v. City Council of Charleston*, 2 Rob. 317; *Mayor of Baltimore v. Defferman*, 4 Gill. 425; *Morris v. Mayor of Baltimore*, 5 Gill. 244; *Fleetwood v. City of New York*, 2 Sandf. S. C. 475; *Fulham v. Down*, 6 Esp. 26.

T. Ewing for plaintiff in reply.

RANNEY, J. Two questions arise upon the bill of exceptions taken upon the trial of this cause in the superior court: First, Had the city council of Cincinnati power, under their charter, to enact and enforce the 24th and 25th sections of an ordinance "To regulate hucksters and to prevent forestalling," passed Sept. 18, 1843, and amended May 23, 1845; and, second, May the money paid by the plaintiff, to obtain his licenses, if these sections are illegal, be recovered back in an action for money had and received. We will consider these questions in the order thus stated.

I. By the 24th section, a huckster is thus defined: "Any person, *not a farmer or butcher*, who shall sell, or offer to sell, in market, any meats, vegetables, provisions, groceries, wares, or other commodities whatsoever, not of his own produce or manufacture, *shall be deemed a huckster.*"

270] *The other sections referred to provide, in substance, that the city council may, on petition, setting forth the kind of articles to be dealt in, grant licenses to hucksters for one year, for such sum as they may see proper, which license shall specify the kind of articles to be dealt in as described in the petition; and the amendatory ordinance further provides that "Every person who shall be guilty of huckstering, without license, shall, on conviction thereof, pay a fine not exceeding thirty dollars for each offense; and any licensed huckster who shall be convicted of forestalling, shall forfeit his or her license."

In pursuance of these ordinances, the plaintiff, at different times, petitioned the city council, and obtained four several licenses, extending from 1845 to 1848, to sell in the markets of the city, butter, eggs, poultry, fruit, etc., and for which he paid, in the aggregate, the sum of \$95, and one dollar to the mayor for issuing each license, which was shown to be a reasonable compensation for the service. To sustain these ordinances, the counsel for the city relies

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upon the following clause, in the 9th section of the city charter, passed March 1, 1834: "They [the council] shall erect, establish, and regulate the markets and market-places of said city, for the sale of provisions, vegetables, and other articles necessary for the sustenance, comfort, and convenience of said city and the inhabitants thereof." This provision of the charter came under review at the December term of the court in bank, in the year 1840, in the case of *The City of Cincinnati v. Buckingham*, 10 Ohio, 257, and it was there held that an ordinance collecting twenty-five cents from persons occupying, with a wagon or other vehicle, stands in the market-place during market hours, was lawful, and might be enforced by fine and judgment before the mayor. This decision proceeded upon the ground that the sum exacted was not a tax, but "rather a price demanded for accommodations provided for the frequenters of the market by the city authorities."

*With a view of limiting this power of the city, affirmed to ex- [271] ist by this decision, the legislature, then in session, passed the supplementary and explanatory act of February 19, 1840; by which it is in substance provided that the charter shall not be so construed as to empower the city council to pass an ordinance to levy any tax, toll, assessment, or other charge upon any wagon or other vehicle, or the animals belonging thereto, bringing produce or provisions to the market, or for occupying a place with the same in market-places on market days, or the evenings previous thereto. This act then contains the following proviso: "That nothing in this act contained shall prohibit the city council from passing all ordinances necessary and proper to *prevent forestalling the markets and huckstering therein.*"

It is insisted by the plaintiff, that the sections of the ordinances now under consideration, are in conflict with this act; and further, that the sum demanded for a license to pursue the business, and to avoid the penalties, is substantially a tax upon the particular employment, and involves the exercise of a power not conferred upon the city by its charter.

We are of opinion that these positions are well taken, and that, for either reason, these provisions of the ordinances are unauthorized and void.

1. The act of 1840, like every other law, must be construed by the language employed. Where there is no ambiguity in that, no construction at variance with the plain and obvious import of the

words is allowed. That act in positive terms extends the benefit of its provisions to every person bringing produce or provisions to the market in the manner specified in it. It can not be limited without adding to the enactment, which neither the city council nor the court can be permitted to do. The city council have, however, undertaken it. While the law exempts every person bringing provisions to the market as above, from any charge whatever, without any regard to the fact whether it is his own produce or manufacture, the ordinance imposes a fine upon every *person, not a farmer or butcher, who sells or offers for sale any article not of his own produce or manufacture. No matter whether in large or small quantity, or whether brought upon wagons with horses attached or in the less imposing way of a hand-cart or wheel-barrow. And this is done by defining all such persons, not being farmers or butchers, as hucksters; and we are told that the council have a right to determine who shall be deemed such. If this is so, and the council have a right to include large classes of persons not falling within the ordinary signification of the word, no reason can be given why they may not also include farmers and butchers, and in that way repeal the law altogether. It is conceded that the word, without being thus improved upon, signifies a petty dealer—a retailer of small articles of provisions, nuts, etc. Webster informs us that “it seems to be from *hocken*, to take on the back, and to signify primarily a pedlar, one that carries goods on his back.” Without entering into very nice distinctions, for which we acknowledge our want of qualifications, we feel no hesitation in saying that the legislature must be presumed to have intended what the common and ordinary import of the language used would indicate; and that it was no part of the franchises of municipal corporations to change the meaning of English words.

Undoubtedly the council may, if they see proper, prevent huckstering in its true and proper sense, in the markets. That power, if not given, is expressly recognized by the act of 1840; and to this end they may employ any appropriate and necessary means. But they can not, under this pretence, exercise another great substantive power, like that of taxation not conferred by the charter. To hold otherwise would be to allow a single granted power to draw to it all others, however remotely connected. But the council have not undertaken to prevent huckstering. When they do so, it will be time to consider the extent and nature of this power.

2. The case is equally clear upon the other ground stated. It is unnecessary to consider whether the state had power to *levy [273 taxes upon any particular employment or business. It is sufficient for present purposes that, with the exceptions contained in the 11th section of the charter, no such power has been conferred upon the city of Cincinnati. The power is expressly conferred to levy taxes to defray the current expenses of the city upon the real and personal property therein, as it appears upon the grand levy of the state. The city is thus clothed with ample power, by this mode of taxation, to raise money to accomplish all its lawful purposes. On any principle this necessarily excludes all other modes of taxation, as any other becomes unnecessary to carry into effect its granted powers. But we have no hesitation in placing it upon higher ground. The power to tax is one of the highest attributes of sovereignty. It involves the right to take the private property of the citizen without his consent, and without other compensation than the promotion of the public good. Such interference with the natural right of acquisition and enjoyment guaranteed by the constitution, can only be justified when public necessity clearly demands it. Being a sovereign power, it can only be exercised by the general assembly, when delegated by the people in the fundamental law; much less can it be exercised by a municipal corporation without a further unequivocal delegation by the legislative body. None such is found here, and the only remaining question is, Was the sum demanded by the ordinance for the license to trade, a tax? The sum required is limited only by the discretion of the council; but whatever it may be, it goes into the city treasury and constitutes a part of its general fund. The term has been correctly defined to be one of general import, including almost every species of imposition on persons or property for supplying the public treasury, as tolls, tribute, subsidy, excise, impost or customs. In a more limited sense it is the sum laid for the same purpose upon polls, lands, houses, personal property, professions and occupations. Whether regarded in the larger or more limited sense, the sum here exacted is clearly included. A license may include a tax or it may not. If the exaction *goes no further than to cover the necessary ex- [274 penses of issuing it, it does not; but if it is made a means of supplying money for the public treasury, we agree with the court in *State v. Roberts*, 11 Gill & Johns. 506, that it "is a tax, is too palpable for discussion."

Nor do these views necessarily conflict with the case of the City of Cincinnati v. Bryson, 15 Ohio, 625. That case arose upon an ordinance requiring draymen, etc., to obtain a license, for which they were charged three dollars. The council had express power, by the charter, to license and regulate draymen. It was agreed by the whole court that this conferred no taxing power; but a majority of the court thought it was not sufficiently shown that the sum demanded exceeded the necessary expenses incident to the issuing of the license. The doctrine of the case is, so far, not incorrect, whether a correct application of it was made or not.

II. These ordinances being illegal and void, our remaining inquiry is, Can the plaintiff recover the money he paid to obtain the licenses in this action for money had and received? The bill of exceptions shows that the licenses were issued upon his own petition, and that the money was paid without protest or any notice whatever that he intended to recover it back. Under these circumstances it is claimed by the city that the payment was voluntary, and no implied promise arises to refund it. This claim is resisted by the plaintiff, and it is insisted that the payment might well be made to avoid prosecution for the penalties, and prevent interruption to his business; and such payment would not be considered voluntary; and one of his counsel says he "makes the assertion without fear of successful contradiction, that in all the authorities extant, not one can be adduced to contradict the plaintiff's right to recover." In this conflict of opinion between counsel, we must be guided by the law as we find it, in the settlement of this question: Was the payment, in the legal sense, voluntary or involuntary? In the case of *Fulham v. Down*, 6 Esp. 26, Lord Kenyon is reported 275] to have said: "A voluntary payment of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity (unless to redeem or preserve his person or goods) is not the subject of an action for money had and received."

The case of *Brisbane v. Dacres*, 5 Taunt. 143, was an action brought to recover back the amount of certain freights for the transportation of specie, received by the defendant illegally, as commander of a government vessel. The court refused to allow a recovery, and laid down the principle broadly, that if a person, with knowledge of the facts, but under a mistake as to the law, pays over to another, claiming it as a right, money which he was not compelled to pay, he can not, upon discovering what his legal right

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was, recover it back, there being nothing against conscience in the other party's retaining it. Gibbs, J., says: "If we were to hold otherwise, I think many inconveniences may arise; there are many doubtful questions of law; when they arise, the defendant has his option either to litigate the question or to submit to the demand and pay the money. I think that by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them. He who receives it has a right to consider it as his without dispute; he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right, by such voluntary payment, should be at liberty, at any time within the statute of limitation, to rip up the matter and recover back the money." And Lord Mansfield remarked, that the maxim *volenti non fit injuria*, applied most strongly to the case.

The case of *Wilson v. Ray*, 10 Ad. & El. 82, was brought to recover the amount paid upon bills given by the plaintiff, an insolvent, to obtain the signature of the defendant to a composition deed. The court held that he could not recover; for the transaction had been closed by a voluntary payment, with a full knowledge of the facts, and ought not to be reopened; and that it made no difference that the sum in question had not been recovered by action. Lord Denman, C. J., *said: "This plaintiff might have then refused [276 payment; and if the defendant had brought his action, he had the opportunity of defending himself by the illegal nature of the consideration. He waived the advantage, and voluntarily paid the bills with a full knowledge of all the facts; and it is not now open to him to deny that he was liable on them." In the case of *Atlee v. Backhouse*, 3 Mees. & Wels. 644, Lord Abinger, C. B., states the result of all the English cases to be, that in all cases where goods of the party have been wrongfully seized or detained for the purpose of exacting money, he is entitled, after payment of the money, to bring an action for money had and received, to try the right. And in the very recent case of *Oates v. Hudson*, 5 Law & Eq. 470, the rule, as laid down in *Atlee v. Backhouse*, was approved by the whole court.

The case of *Elliot v. Swartwout*, 10 Pet. 150, was brought to recover back of the defendant money illegally received by him as collector of duties at the port of New York. The supreme court of the United States held, unanimously, that the action would not

lie. Mr. Justice Thompson, in delivering the opinion, said that it presented "the case of a purely voluntary payment, without objection or notice not to pay over the money, or any declaration made to the collector of an intention to prosecute him to recover back the money. It is, therefore, to be considered as a voluntary payment, by mutual mistake of law; and in such case, no action will lie to recover back the money. The construction of the law is open to both parties, and each presumed to know it." And he adds: "It is no sufficient answer to this that the party can not sue the United States. The case put in the question is one where no suit will lie at all."

The doctrine of the supreme court of Massachusetts upon this subject is very clearly stated in the recent case of the Boston and Sandwich Glass Co. v. The City of Boston, 4 Met. 181. The action was brought to recover the amount of a tax illegally assessed and collected under protest, and a recovery was had upon the ground 277] that the collector had a right to *seize property in the first instance without resorting to an action. The court, after laying down the general rule to be, "that if a party, with a full knowledge of all the facts of the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he can not afterwards allege such payment to have been made by compulsion, and recover back the money, even though he should protest, at the time of such payment, that he was not legally bound to pay the same," proceed to say: "The reason of the rule and its propriety are quite obvious, when applied to a case of payment upon a mere demand of money, unaccompanied with any power or authority to enforce such demand, except by a suit at law. In such case, if the party would resist an unjust demand, he must do so at the threshold. The parties treat with each other on equal terms; and if litigation is intended by the party of whom the money is demanded, it should precede payment."

The decisions in New York are to the same purpose. In the case of Clark v. Dutcher, 9 Cow. 674, it was held, after an elaborate review of the English cases, that where money is paid with a full knowledge of the facts and circumstances upon which it is demanded, or with the means of such knowledge, it can not be recovered back upon the ground that the party supposed he was bound in law to pay it when in fact he was not. He will not be permitted to allege his ignorance of the law, but it will be consid-

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ered a voluntary payment. The same doctrine is reiterated in *Silliman v. Wing*, 7 Hill, 159, and *Abell v. Douglas*, 4 Denio, 308. In perfect accordance with those cases, and very much in point in this, is the case of *Fleetwood v. The City of New York*, 2 Sand. S. C. 475, in which it was held that the payment of an illegal demand without any legal compulsion or duress of goods could not be recovered back, although protested against at the time.

And in Maryland, in the cases of *Mayor of Baltimore v. Lefferman*, 4 Gill, 425, and *Morris v. The Mayor of Baltimore*, 5 Gill, 244, the court of appeals held that a payment could not be *regarded as compulsory, so as to entitle the payer to re- [278 cover back the amount, unless to emancipate his person or property from an actual and existing duress imposed by the party to whom such payment is made.

The case of *Robinson v. The City of Charleston*, 4 Rich. 317, decided by the court of appeals of South Carolina in 1846, is precisely in point in this. There the city council passed an illegal ordinance, imposing a higher price on non-residents for badges for laborers than upon residents. The plaintiff, a non-resident, paid it for several years, and then sued to recover back the money. The court held he could not, and say, "he either paid it with a knowledge of the law on the subject, or he did not. In either point of view the payment was voluntary."

I shall refer to but one other authority—the case of *Smith v. The Inhabitants of Readfield*, 27 Maine, 145, decided by the supreme court of Maine in 1847. A tax was illegally assessed upon the plaintiff, which he paid without coercion, and sued to recover it back. The court held that it was paid voluntarily; that the fact that the taxes were paid to collectors, who had warrants for the collection, afforded no satisfactory proof of payment by duress; and they add: "To constitute payment by duress in such a case, there should be proof of an arrest of the body, or of a seizure of the property, or proof authorizing the conclusion that such an arrest or seizure could be avoided only by payment."

This unbroken chain of authority seems to warrant the conclusion, that a payment of money upon an illegal or unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the

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payment is made to prevent it. But where he can only be reached by a proceeding at law, he is bound to make his defense in the first instance; and he can not postpone the litigation by paying the demand in silence, and afterward suing to recover it back. We 279] *have carefully examined the cases cited by the plaintiff's counsel, and can find nothing in any of them that militates against these conclusions. We will not say that no case can be found that would warrant the plaintiff's recovery; but we can say that, if any such exists, we have been unable to find it. The justice of the case, no less than the law, is against him. He has enjoyed the monopoly which these illegal ordinances were calculated to afford, and it is fair to presume, as in all such cases, that he has got back the money paid for his licenses from his customers in the increased price of his commodities. To tax these same customers to pay it to him, and others similarly circumstanced, again, would not be right if it was law; but most clearly it is neither. The judgment of the superior court is affirmed. -

Judgment affirmed.

**ARETUS CRANE AND WIFE v. THE EXECUTORS OF DANIEL DOTY
AND OTHERS.**

A testator can not, by any words of exclusion used in his will, disinherit one of his lawful heirs, in respect to property not disposed of by his will.

Such words can not be used to control the course of descent, so as to carry the property to his other heirs.

They can not be used to raise an estate by implication in favor of his other heirs; there being no attempt in the will to dispose of the property or to create any interest therein.

THIS is a bill in chancery reserved in the district court in Butler county.

The bill is filed to obtain a construction of the last will and testament of Daniel Doty, deceased. The will contains devises and bequests as follows: To the widow of testator, a life estate in all his lands in certain sections, as much household property as she wishes, and an annuity of fifty dollars; to his son John, fifty-two 280] acres in section *twenty-two; to his son Daniel, a tract in section

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twenty-seven; to his son Joseph and his daughter Huldai, a tract in section twenty-one; to his daughter Betsey, eighty acres in section fourteen; and fifty-six acres to his daughter Orpha; to his daughter Jerusha, fifty-two acres in section twenty-seven; to his grandson, Noah Doty, forty-three acres in section eighteen, and \$100 more if he should arrive at full age.

The provision for his daughter Serepta, the complainant, is as follows: "I will to my daughter Serepta, who has had \$854 already, for which I hold her note, and it is my will that she shall have \$200 more and her note, for that she has already had, and no more of my estate."

To his grandson, Albert Jewel, he devises fifty acres of land, and adds to the same the words "and no more of my estate."

The will directs that the debts of his son James, who was deceased, should be paid by his executors, who were also required to support the children of James until they were able to support themselves, and "when the above is complied with, they shall never have any more of my estate."

There is no residuary clause. Upon settlement of the account by the executors, there was a residue of more than five thousand dollars of the personal estate in their hands, and Doty was seized, at the time of his death, of real estate of the value of seventeen thousand dollars, which was not devised.

The bill charges that as to this residue of the personal and real estate, Daniel Doty died intestate, and that Serepta Crane, complainant, as one of his children and heirs at law, is entitled to an equal share with his other children under the statutes of descent and distribution.

The defendants claim that the complainant has been expressly excluded, by the words of the will, from any portion of the estate, except the valued legacy of \$200, and that the residuum is, by necessary implication, carried to the other heirs who are not excluded by the will.

**Thomas Millikin*, for complainants; 1 *Jarman on Wills*, 294, [281 315, 502; 2 *Williams on Ex'rs*, 1270; *Boiseau v. Aldridge*, 5 *Leigh*, 222; *Johnson v. Johnson*, 4 *Beav.* 318; *Gaskin v. Gaskin*, *Cow.* 657; *Vechell v. Britton*, 5 *Browne*, *Par.* 51; 2 *McCord Ch.* 214; 2 *Wend.* 33; 6 *Paige*, 600; 3 *Harr. & McHen.* 333; *Ferguson v. Stewart*, 14 *Ohio*, 140; *Bane v. Wick*, 19 *Ohio*, 335; 4 *Kent Com.* 525.

Elijah Vance and Isaac Robertson, for defendants; 2 *Black.*

Com. 373; 2 Dev. 318; 1 Ves. & Bea. 466; *Roe v. Somerset*, 2 Burr. 2608; *Croke, James*, 75; *Higham v. Baker, Croke, Elizabeth*, 15; 2 Vern. 723; *Schember v. Jackson*, 2 Wend. 56; 5 Barn. & Ald. 785.

RANNEY, J. The whole controversy in this case depends upon the construction to be put upon the will of Daniel Doty, late of Butler county, deceased. The complainant, Serepta, is admitted to be one of his children and heirs at law, and by this bill she claims partition of certain real estate of which he died seized, as well as her distributive share of his personal estate. This claim is resisted by the defendants upon the ground that she is expressly excluded from any such right by the will of said Doty. This will was executed on the 6th of May, 1848, and has been duly proved and admitted to record. Without noticing its provisions in detail, it is sufficient to say that it gives specific bequests to his wife, and to most if not all of his children, and also a grandson, the son of Serepta by a former husband. It also charges his estate with the payment of an annuity of \$50 to the widow, and the payment of the just debts of his son James, then deceased, and the support of his minor children until they arrive at an age to support themselves.

The will contains no residuary clause, and it now appears that, after the payment of debts, and the satisfaction of the specific bequests, there remains real and personal property valued at over twenty thousand dollars, not expressly disposed of by the will. 282] This property is sought to be reached *by this bill. The bequest to Serepta is in these words: "I will to my daughter, Serepta, who has had \$854 already, for which I hold her note, and it is my will that she shall have \$200 more, and her note for that she has already had, and no more of my estate." We have no doubt that the testator, by this last clause, intended to exclude her from any further right to any portion of his property. Whether we can give effect to this intention, consistently with the rules of law, is quite another question. It is very true that our law has always allowed, to every person of mature age, absolute dominion over all he may possess, to dispose of it by last will and testament, saving the rights of the widow and creditors, if any; and it is equally true that where such disposition is made, the will will be construed with great liberality for the purpose of arriving at the intention of the testator. But it is very clear that even the ex-

pressed intention of the testator can not be regarded in the absence of such disposition: and this arises from the very nature and office of a will, which is defined to be "an instrument by which a person makes a disposition of his property to take effect after his decease." If the owner, therefore, for any reason, fails in his lifetime to designate who shall succeed to it, the law steps in at his death and supplies the omission, and casts it upon the heir at law. That the expressed intention of the testator that his heir should not take, can not be regarded, in the absence of any other disposal of the property, seems to have been early settled in England, as appears from a remark of Lord Mansfield, in *Den v. Gaskin*, Cow. 657. He says, "though the intention is ever so apparent, the heir at law must of course inherit, unless the estate is given to somebody else;" and that such continues to be the settled law there, we need no better evidence than the very recent work of Mr. Jarman on Wills, in which the same rule is unqualifiedly laid down. 1 Jarman on Wills, 294, 502. Indeed it is admitted by the defendant's counsel that the decisions in England are all against them upon this point; but they insist that those decisions have their foundation in the disposition of the English courts *to favor the [283 law of primogeniture; and for a still stronger reason, that the exclusion of the heir operates an exclusion of all who could claim the estate only through him, and would therefore leave no one capable of taking during his life. These considerations, they insist, have no application here; and that effect can consistently be given to the words of exclusion in the will of Doty, by allowing the estate to descend to his other children, excluding Serepta, or by raising an estate by implication in their favor to this residuum. In support of this position, they refer us to *Doe ex dem., etc. v. Leroy Stowe*, 2 Dev. (N. C.) 318; and it must be admitted that this case is in point to sustain them. They also concede that this is the only American case they have been able to find in point upon the subject.

The first inquiry is, Can Serepta be excluded and the other heirs take this property by descent? It may be that the considerations alluded to have had influence with the English courts; but aside from them, an insurmountable obstacle exists to giving an affirmative answer. The property must be disposed of upon the death of the owner. It may be disposed of by will; but if it is not, the law disposes of it to all the children alike. All dominion of the owner over it ceases with his life. To allow a testator to leave his prop-

erty undisposed of, and by will to control the course of descent and distribution, would be to allow him to repeal the law of the land. It must go by devise or descent; and in either mode it goes entirely uncontrolled by the other; and it is impossible to conceive of an estate created by a mixture of the two. This being impossible, the next inquiry arises, Can the other children take this property under the will by implication? The general principle upon this subject is thus stated by Mr. Jarman: "The heir is not to be disinherited unless by express words, or by necessary implication; and that implication has been defined to be such a strong probability that an intention to the contrary can not be supposed." 1 Jarm. Wills, 465.

284] *"Conjecture is not permitted to supply what the testator has failed to indicate; for, as the law has provided a definite succession in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one, not pointed out by the testator with equal distinctness." 1 Jarm. Wills, 315.

From a careful examination of all the authorities within our reach bearing upon this question, we are led to the conclusion, that in order to raise an estate by implication, the two following circumstances must concur: First, an interest or estate in the property, less than the whole, must be created expressly by the will, in order that it may appear that the testator had the disposition of the property in his mind; second, the person to take by implication must be named or described in connection with the raising of such interest or estate. The familiar example put in the elementary books is a devise of lands by a man to his heir after the death of his wife. Here an evident intention appears to postpone the heir until the death of his wife, and she will therefore take a life estate by implication. But if the devise were to a stranger, instead of the heir, the same implication would not arise, for it would not sufficiently appear that he did not intend the heir to take the estate in the meantime. Indeed, it is always a question of intention to be derived from the words of the will; but it must appear from the will that the testator has attempted to dispose of the property, and in such disposition has used the name of the person to take by implication, so as to render it at least highly probable that he intended such person to take the interest in the same property that he has not disposed of by words.

We find these requisites entirely wanting in this case. No attempt to create any interest or estate in this property is found in this will. Not the most distant allusion is anywhere made to it, or to the persons that he desires to take it. Under such circumstances, to infer an intention to dispose of it by devise would be to substitute the blindest conjecture for probability, and, in effect, to make a disposition for the party when he has attempted to make none for himself. *We can find that he intended to exclude [285 his daughter Serepta from further participation in his estate; but we can not find that he ever intended to dispose of this property by will. We have already seen that such intention, uncoupled with actual disposition, can not be interposed to interrupt or control the regular course of descent and distribution. I have not particularly noticed the American authorities. If examined, however, they will be found fully to sustain the conclusions to which we have arrived. 4 Kent Com. 525; Boiseau v. Aldridge, 5 Leigh. 222; Myers v. Myers, 2 McCord Chy. 214; 6 Paige, 600; 2 Wend. 33.

Upon the other question raised as to the right of the executors to hold all the residue until the trusts in favor of the widow and James' children are complied with, we are not sufficiently informed from the evidence in the case to decide. The will gives them a large discretion in providing for the support of those children, and puts the estate under their control for the purpose. It is very clear that abundant means should be left undisturbed in their hands to meet this and the other trusts provided for. If, however, the property beyond all contingency is more than sufficient, we can see no good objection to a present division of such excess. The ultimate decree must be made to depend upon the settlement of these questions.

Let a decree be taken construing the will and remanding the cause to the district court for further proceedings.

Decree accordingly.

NOTE.—On the second Monday of February, 1853, Judge Caldwell's term as Chief Justice having expired, Judge Bartley succeeded him.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO,
FOR THE YEAR COMMENCING
SECOND MONDAY OF JANUARY, 1853.

PRESENT:

HON. THOMAS W. BARTLEY,	CHIEF JUSTICE.
HON. JOHN A. CORWIN,	} JUDGES.
HON. ALLEN G. THURMAN,	
HON. RUFUS P. RANNEY,	
HON. WILLIAM B. CALDWELL,	

JAMES LEGG v. SAMUEL DRAKE.

In the argument of a cause before the court or jury, counsel has a right, *by way of argument or illustration*, either to read from a book a pertinent quotation or extract from a work on science or art, or other publication, adopting it and making it a part of his own address to the jury; but not using it as evidence in the case.

A judgment will not be reversed on error, for the action of the court below, in regard to a matter resting within its discretion.

Where a party to an action is called upon and introduced as a witness on the trial, by the adverse party, under the act of March, 1850, to improve the law of evidence, the objection to his competency is waived, and he becomes competent as a witness on the trial for all purposes.

When a witness is produced and examined by a party in an action, even though he be interested to testify against the party calling him, the other party is not limited in his cross-examination to the subject-matter of the examination in chief, but may cross-examine him as to all matters pertinent to the issue on the trial; limited, however, by the rule, that a party can not, be-

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fore the time of opening his own case, introduce his distinct grounds of defense or avoidance, by the cross-examination of his adversary's witnesses.

*When the cross-examination is extended to topics disconnected with the [287 particular facts disclosed in the direct examination, leading questions to the witness may be proper or improper, according to circumstances, and the control of this must rest within the discretion of the court.

ERROR to the district court of Franklin County.

S. W. Andrews, for plaintiff in error.

Swayne & Baber for defendant.

BARTLEY, C. J. The original suit was an appeal from the judgment of a justice of the peace to the court of common pleas of Franklin county, wherein the plaintiff below, Samuel Drake, declared against the defendant, James Legg, in case, for a false warranty and deceit in the trade of a horse. It appears that on the trial of the cause at the September term of the common pleas for 1850, on an issue to a jury, on the defendant's plea of not guilty, the plaintiff, after offering evidence tending to prove that he and the defendant, on the 4th day of July, 1849, had traded horses, and that also on the said day, prior to the trade, the parties had held a conversation on the subject of trading horses, at the blacksmith shop of one James Ferguson, called the defendant, James Legg, as a witness, by whom the plaintiff proved the time when and place where the trade took place, the identity of the horses traded, and that the horse traded by the defendant was the same horse that he had talked of trading at the blacksmith shop. On cross-examination, the defendant's counsel asked the witness to state the terms of the trade, also the conversation at the blacksmith shop before mentioned, to which the plaintiff objected, and the court sustained the objection; to which ruling by the court the defendant excepted.

It further appears that, in the argument of the cause before the court and jury, the defendant's counsel offered to read certain passages from Youatt's work on Veterinary Surgery, the defendant having proven by a witness that the work was a reputable and standard authority on that subject; but not having either exhibited to the witness the particular book *from which he proposed [288 to read, or offered the same in evidence in the cause. The plaintiff objected, and the court sustained the objection, and refused to allow the defendant to read from the book in argument; to which ruling, also, the defendant excepted.

Various other exceptions to the decisions of the court were taken on the trial of the cause; on which, together with the exceptions above mentioned, error is assigned; but it is not deemed necessary to notice any more of them here.

The trial in the court of common pleas resulted in a judgment for the plaintiff below for sixty dollars and costs, which judgment was on writ of error in the district court of said county of Franklin, at the June term thereof, 1852, affirmed. And the present writ of error is prosecuted in this court to reverse the judgment as affirmed in the district court.

The question presented by the last-mentioned exception, is not whether standard books on matters of science and art, when pertinent, can be proven and given in evidence on the trial of the cause; but whether counsel, in their address to the jury, have a right, by way of argument or illustration, to read extracts from works on science not given in evidence. While the right of a party to be heard by his counsel on the trial of his cause is not to be questioned, and is often of great service in the investigation of questions, both of law and of fact; yet, inasmuch as this privilege may be liable to abuse, to the great hindrance and annoyance of courts in the progress of business, the extent and manner of its exercise must in some measure rest in the sound discretion of the court. Although unlimited license in range and extent is not allowed to counsel, in their addresses to the court and jury, yet no pertinent and legitimate process of argumentation within the appropriate time allowed should be restricted or prohibited. And it is not to be denied but that a pertinent quotation or extract from a work on science or art, as well as from a classical, historical, or other publication, may, by way of argument or illustration, be not only admissible, but sometimes highly proper. And it would seem to make no difference [289] whether it was repeated by counsel from recollection or *read from a book. It would be an abuse of this privilege, however, to make it the pretence of getting improper matter before the jury as evidence in the cause.

In the case of *Rex v. Courvoisier*, 9 C. & P. 362, it was adjudged that council had a right to read to the jury the general observations of a learned judge, made in a case tried some years before, on the nature and effect of circumstantial evidence, if he adopted them as his own opinions, and made them part of his address to the jury.

But in the case before us the bill of exceptions does not show

that the passage of Youatt's work on veterinary surgery, which the counsel proposed to read, had any relevancy to the cause on trial, or came within the appropriate and legitimate scope of argument. It is not, therefore, made to appear sufficiently that any right of the party was interfered with, to his injury in this respect; and a judgment will not be reversed on writ of error for the action of the court below, in regard to a matter resting within its discretion.

The error assigned on the other ground of exception to the ruling of the common pleas above mentioned, involves an inquiry as to the extent to which the cross-examination of a party to a suit may be carried when made a witness on the trial by the adverse party. The act of March, 1850, to improve the law of evidence, authorizes the examination of any party to an action at law, as a witness by the adverse party, "*in the same manner, and subject to the same rules of examination, as other witnesses are compelled to testify.*" When, therefore, a party in any action avails himself of this provision of the law, and makes his adversary a witness in the cause, he thereby waives the objection to his competency, and places him on the same ground with any other witness in the case, both as to competency and as to credibility. So that, when a party to the suit is thus made a witness, he becomes competent for all purposes, and may be subjected to cross-examination as any other witness, with a single qualification that a cross-examination on behalf of the party himself called as a witness, with a view to his own impeachment, would be *incompatible with his situation as both party and witness; for [290 the reason that he could not allege his own want of credibility.

What, then, is the legitimate extent of the right to cross-examine a witness? It has been held in England, that when a competent witness has been called and sworn on one side, the other party will in strictness be entitled to cross-examine, although the party calling him has not examined him in chief at all. 2 Phillips' Ev. 397.

A different practice, however, has been adopted in this country. *Ellmaker v. Buckley*, 16 Serg. & R. 72. But when a witness has been examined by one party, whether the right of the other party to cross-examine him is limited to the matters upon which he has already been examined in chief, or extends to the whole case, does not appear to be settled by a perfect concurrence of authority.

The case of the Philadelphia and Trenton R. R. Co. v. Stimpson, 14 Pet. 448, has been understood as limiting the cross-examination

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of a witness to the facts and circumstances connected with the matter stated in the direct examination. The question, however, was not distinctly presented in that case, and the rule on the subject was only noticed by the court incidentally.

But in the case of *Webster v. Lee*, 5 Mass. 334, it is distinctly settled, that where a witness is produced and examined by a party in an action, even though he be interested to testify against the party calling him, the other party may cross-examine him as to all matters pertinent to the issue on the trial, although the witness could not have been called and examined at his own instance in the first place. And in the case of *Merrill et al. v. Berkshire*, 11 Pick. 269, it was adjudged that a party calling upon a witness interested against him, could not confine the cross-examination to matters in which the witness had no interest. Thus it was ruled in the case of *Eden v. Varick*, 7 Cow. 238, that where a witness directly interested in favor of the plaintiff in a cause is called and examined by the defendant to prove a particular fact, such as the execution of a bond, 291] the plaintiff *has a right to cross-examine him generally as to the merits of the cause. This decision was subsequently affirmed in the court of errors. 2 Wend. 166. And the case of *Fulton Bank v. Stafford*, 2 Wend. 483, is to the same effect on this point. In the case of *Morgan v. Bridges*, 2 Stark. 279, it was held that where a party is under the necessity of calling his real adversary to the suit (although not a party to the record) for the purpose of formal proof only, he makes him a witness for all purposes, and subject to a cross-examination as to the whole case.

The weight of these authorities is not weakened by the case of *Ellmaker v. Buckley*, 16 Serg. & R. 72, or *Floyd v. Bovard*, 6 Watts & S. 75. In the former case, the question was whether a defendant could open his case and introduce the matter of his defense in the cross-examination of plaintiff's witnesses; and in the latter, the question was as to the competency of the witness and the competency of the substance of testimony erroneously rejected.

The term cross-examination would not, perhaps, strictly import any thing more than a leading and searching inquiry of the witness for further disclosures touching the particular matters detailed by him in his examination in chief. This, however, is said to be one of the principal and most efficacious tests which the law has devised for the discovery of truth. And inasmuch as it has for its object the disclosure of not merely the extent and degree of accuracy of

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the witness' knowledge, as well as the means of his knowledge, but also his motives, inclinations, powers of memory, and relative situation in respect to the parties, and the subject-matter of the investigation, it becomes an important test of the credibility of the witness. To limit the cross-examination, therefore, exclusively to the particular facts called out in the direct examination, would often defeat one of its most useful and important objects.

It has been said, it is true, that although the cross-examination generally admits of leading questions, yet if the cross-examination has respect to, and is in reference to new matter *or [292 topics disconnected with the subject-matter of the direct examination, leading questions can not be asked. *Harrison v. Rowan*, 3 Wash. C. C. 584. This, however, must rest on the discretion of the court. In the case of *Moody v. Rowel*, 17 Pick. 490, it was held that, upon the cross-examination of a witness, the court may, in its discretion, permit leading questions to be put, although relating to matters not inquired of upon the direct examination.

The rule, however, that the cross-examination may be extended generally to the merits of the cause, or to any matter embraced in the issue, is limited by the application of another rule, which often becomes important in the trial of a cause, and that is that a party can not, before the time of opening his own case, introduce it to the court or jury by the cross-examination of the witnesses of his adversary. *Ellmaker v. Buckley*, 16 Serg. & R. 72. The order in which each party may introduce his evidence on the trial of a cause, must, to a great extent, rest in the discretion of the court. But a defendant has no right to go into the distinct matter of his defense, by way of avoidance, before the plaintiff has rested. And to allow a party defendant to do so in the cross-examination of the plaintiff's witnesses, would be giving him an undue advantage.

It would appear that the fair conclusion, from all the authorities, is, that the right of cross-examination is not to be limited by the particular facts disclosed in the examination in chief, but may be extended to whatever the party calling the witness is required to establish to make out and sustain his cause of action or his defense. Thus a witness of the plaintiff may be cross-examined by the defendant touching all matters which it is competent for the plaintiff to prove under the issue, in order to entitle him to recover. And, on the other hand, the plaintiff may cross-examine the defendant's

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witnesses to all matters which the defendant may prove under the issue, in order to sustain his defense.

In the case before us, the witness, after having testified as to the *time when* and the *place where* the contract was made, and the identity of the horses traded, was, on cross-examination, *asked to state the terms of the contract, etc., a matter connected somewhat with the subject of the direct examination. It would be too stringent a practice to thus curtail the right of cross-examination, and would lessen the efficiency of this important test of truth.

The court of common pleas clearly erred in sustaining the objection to the cross-examination; and for this cause the judgment of affirmance in the district court is set set aside, and the judgment of the court of common pleas reversed, and the case remanded for further proceedings.

Judgment reversed.

DUNCAN McDONALD AND OTHERS v. HENRY ATEN AND OTHERS.

A creditor can not, at his option, transfer the settlement of the estate of his deceased debtor from the probate court to a court in chancery.

The representatives of an estate may be so situated with reference to interests sought to be converted into assets, that a creditor may invoke the aid of a court of equity to control such interests, and place them into the hands of such representatives to be administered; but equity will go no further, and leave the settlement of the estate to the probate court.

Where the dower interest of a widow, in property sought to be converted into assets, is manifest, it will be protected, although she may not have filed an answer.

Upon the decease of a debtor, his estate, real and personal, by law, stands for the payment of his general creditors alike, and one creditor can not, by superior diligence, acquire a superior right to such estate.

CHANCERY, reserved in the district court of Columbiana.

Umbstaetter, Stanton & Wallace, for complainants: *Grosvenor v. Austin*, 6 Ohio, 54; *Watson v. Clapp's Heirs*, 8 Id. 248; *O'Brien v. Coulter*, 2 Blackf. 421; *Brown v. McDonald*, 1 Hill, 297; *McKay v. Green*, 3 Johns. Ch. 58; 18 Ves. 469; *Whiting v. Johnson*, 11 Serg. & R. 328; *M'Kee v. Gilchrist*, 3 Watts, 230; *Fairfield v. Baldwin*, 12 Pick. 388; *Sweeny v. Ferguson*, 2 Blackf. 129.

Upham & Aten, for defendants.

CORWIN, J. The bill alleges that the complainants hold the following claims against the estate of Albert G. Catlett, *dec'd. [294 to-wit: D. & D. McDonald & Co., \$932.93; Robert George & Son, \$1,057.76; Silas Potts, \$139.67; James Dalzell, \$63.46; M'Gills, Bushfield & Roe, \$635.64; M'Gills & Bushfield, \$417.21; Bailey, Brown & Co., \$486.22; James Graham, \$273.32; Bagaley & Smith, \$292.47; James M'Caskey, \$493.88—all of which have been duly presented to and allowed by Alexander M'Laughlin, one of the administrators of Catlett, who died in March, 1848, leaving Catharine Catlett, his widow, and three minor children his heirs at law. That Alexander M'Laughlin and Richard Aten were appointed administrators, and that the personal estate of said decedent is wholly insufficient to pay the debts owing by said deceased, and the estate is represented to be insolvent.

The bill further charges that, at the death of Catlett, defendant, Henry Aten, his father-in-law, was seized in fee of lots 52 and 53 in Wellsville, in trust for Catlett; on which lots were erected large and valuable buildings, consisting of the store, warehouse and dwelling house of said Catlett, of the value of \$5000. That the real estate was purchased by Catlett from Michael Tiernan and Alexander Young, assignees of Albert G. Richardson, the payments therefor being made by Catlett to the assignees. That when said payments were made and Catlett entitled to conveyance, he caused the conveyance to be made to his father-in-law, Henry Aten, who has since held the legal title. That Catlett continued to use and occupy the property as his own, and was the equitable owner thereof, from the time of the purchase to the time of his death. That Henry Aten combining, etc., with his son Richard, one of the administrators, pretends that the property belongs to Henry Aten; that he is the sole legal and equitable owner thereof, and that it should not be subjected to the payment of the debts of the estate. That Henry Aten further contriving to injure, etc., the creditors, and to cover up said estate, pretends to be a creditor of the estate, and to hold large claims against the same, the amount of which complainants can not specify; that said claims are not legal, etc.

*The prayer of the bill is, that Aten may set forth his title [295 to the property, how and for what purposes he acquired title; also, what claims he has against the estate; that said premises may be subjected to payment of complainants' debts, and the pretended claims of said Henry Aten cancelled, so far as they may interfere

with the full liquidation of complainants' claims, and for general relief.

The answer of Henry Aten, Sr., not under oath, admits the insolvency of Catlett's estate; denies being seized of lots 52 and 53 in trust for Catlett, or that the buildings erected thereon were the property of Catlett. Admits that the real estate was in the first instance purchased and bargained for by Catlett from the assignees, but denies that any payments were made by Catlett to said assignees; denies that Catlett was entitled to conveyance, he not having paid the purchase-money. Respondent having paid, or being liable for the purchase-money to the assignees, caused the conveyance for the same to be made to himself, as in equity and justice he had a right to do. Admits that he permitted Catlett to occupy the property to the time of his death, upon the same terms that he permitted his own sons to use and occupy other property of his, they paying taxes and taking care of the same.

Respondent denies that Catlett continued to use and occupy the property as his own, or that he was the equitable owner thereof from the period of his purchase to the time of his death; denies that it ought to be appropriated to the payment of complainants' debts; denies all fraud, or intention to cover up said estate, and claims to be a *bona fide* creditor of the estate, holding large claims against the same, the nature and amount of which are set forth in the answer.

As to the nature, etc., of his title, respondent states: That Catlett having contracted for the purchase of the lots with the assignees for \$2,892.75, and respondent having become individually liable for some of the payments, and jointly liable with Catlett for others to the assignees, and Catlett not being able to meet the payments, as they became due, agreed with respondent that if he would pay the 296] purchase-money to the assignees, as the payments became due, they should convey the lots to respondent; in accordance with which agreement, the assignees, by deed dated September 15, 1844, conveyed the lots to respondent; in consideration of which conveyance, respondent has performed his agreement with Catlett, as well as Catlett's agreement with the trustees—and has fully paid the purchase-money; by virtue of which respondent claims title; Catlett using and occupying said lots and making valuable improvements thereon, with which respondent stands charged on said Catlett's books.

To the answer of Henry Aten there is a replication. None of the other defendants have answered.

Upon this state of pleading, a volume of testimony was taken and the cause referred to a master, upon whose report the court of common pleas rendered a decree in favor of complainants, and ordered the sale of the premises. The court also found that defendant Aten had paid \$2,400 to Catlett, which by him was paid on the lots; and confirmed the master's report, requiring that that sum, with interest, should be first paid to Aten out of the proceeds of the sale. From the evidence in the case, we are satisfied with the confirmation of the master's report by the court of common pleas, and that the decree ought not to be disturbed, except in this, that no notice is taken of the dower interests of the widow of said Catlett. It being found that Catlett died seized of an equitable title to the lots in question, the right of his widow to dower therein is clear; and no decree should be rendered requiring a sale of the premises, and disposing of the proceeds of such sale in disregard of her rights.

The principal subjects of disagreement in this case are, as to the jurisdiction of courts of chancery, in a case like the present; and, whether the proceeds of the sale shall go to the complainants alone, or to the general creditors of the estate. We certainly do not admit the right of a creditor, by any proceeding, at his own option, to transfer the settlement of an estate from the probate court to a court of equity. But cases have arisen, and may arise again, when, from the *peculiar relations of the administrator to the estate, [297 or his connection with a title sought to be converted into assets, in the opinion of a majority of this court, the aid of a court of equity may be invoked by a creditor, not for a general settlement of the estate of which he is a creditor, but for the purpose of reaching and placing in the hands of the administrator assets which might otherwise not be reached. But, this object accomplished, the court of equity will have performed its function, and leave the distribution of the assets thus obtained to the probate court.

The case of *Watson v. Clapp's Heirs and Adm'rs*, 8 Ohio, 248, is in point, and fully sustains this view of the jurisdiction of a court of equity for such purpose. The claim of the complainants, to appropriate the whole of the proceeds of the property, to the exclusion of the other creditors of the estate, can not be maintained. Upon the death of a debtor, his estate, of whatever description, stands for the payment of all of his general creditors alike; and

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the right of one general creditor to exclude another can not be supported upon any principle, although he may have been most vigilant, and by his vigilance may have increased the assets in the hands of the administrator.

Finding no objection to the jurisdiction of this court, sitting as a court of equity, in a case like the present, and being satisfied that the report of the master commissioner is well sustained by the evidence, a decree may be taken for the sale of the property, subject to the dower estate of the widow of said Catlett, deceased, providing for the satisfaction of the lien of said Henry Aten, Sr., for the amount so by him paid on said lots and for the payment of the costs of this proceeding, and requiring the surplus to be paid over by the master to said administrators for distribution amongst the creditors of said estate.

Decree accordingly.

RANNEY, J., having been of counsel, did not sit.

298] *CONANT, ELLIS & Co., AND BALDWIN & GREEN v. RUFUS W. REED, THE SENECA COUNTY BANK, AND OTHERS.

By the provisions of the "act to incorporate the State Bank of Ohio and other banking companies" (43 Ohio L. 24), a bank holds a lien on the shares of its stockholder for the amount of his indebtedness to it, which can not be defeated by a transfer made without the consent of a majority of the directors, nor will such consent authorize a transfer if the debt is overdue and unpaid.

Although an assignment on the books of the bank may be necessary to pass a legal title to stock, yet an equitable title may be otherwise conveyed; and the bank is bound to respect such equity from the time it receives notice of it. Hence, debts contracted by the assignor to the bank, after the receipt of such notice, are not, as against the assignee, liens upon the stock.

Notice of such assignment to the cashier is notice to the bank.

Where a person holds a full and perfect equitable title to stock, of which the bank has notice, he is also entitled in equity to the dividends thereafter accruing upon it.

It is a violation of said act for one of the independent banks chartered by it to make loans to a director before the adoption by the stockholders of by-laws to regulate the liabilities of directors; and such violation may be a cause

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of forfeiture of the charter, and will render each director who knowingly participates in or assents to the same, individually liable for all damages which the company, its shareholders, or any other persons, body politic or corporate, shall have sustained in consequence of such violation. But the court are not prepared to say that no debt is created by such a loan.

But even if such debt is void, yet if it be paid, a creditor at large of the payer can not reach the money or property with which it is paid; such creditor having no lien upon, or specific interest in such money or property at the time of payment.

CHANCERY. Reserved in Seneca county.

Wilcox and Watson, for complainants: 16 Ohio, 469; 3 Bar. Ch. 207; 3 Comst. 478; 4 Denio, 480; 20 Wend. 91; 3 Sandf. Ch. 31; Id. 292; 14 Johns. 435; 2 Hill, 522; 5 Barb. 134, 160; 4 Id. 336, 527; 3 East, 225; 5 Conn. 566; 1 Rand. 77; 2 Sandf. 146; 2 Wheat. 490; 3 Paige, 350; 22 Wend. 364.

Gibson, for the Seneca County Bank: 2 Conn. 599; 3 Ib. 544; 6 Id. 552; 5 Id. 246; 14 Mass. 180; 17 Id. 97; Angel & A. on Corp. 243; 15 Serg. & R. 140; *1 Ves. Jr. 254; 3 Paige, 350; 8 [299 Serg. & R. 83; 12 Id. 77; 2 Cow. 770; 2 Wheat. 340; 1 Breesee, 122; 1 Hall's S. C. 70; 16 Mass. 94; 3 How. 73; 2 Doug. 155; 11 East. 180; 1 Bos. & Pull. 3; 4 Johns. Ch. 222; 5 Denio, 329.

THURMAN, J. This is a bill originally filed by Conant, Ellis & Co., to which Joshua Baldwin and Sarah Green, administratrix of Jacob Green, were subsequently added as parties complainant. The object of the bill, so far as Conant, Ellis & Co. are concerned, is to subject certain assets to the payment of a judgment recovered by them against the defendant, Reed, while the relief sought by Baldwin and Green is a decree for the transfer to them of sixty shares of the capital stock of the Seneca County Bank, which they claim as assignees of Reed, and upon which the bank asserts a lien for the amount of Reed's indebtedness to it. The bill is not filed under the statute controlling assignments made to prefer creditors, nor do the complainants now seek the same property. Conant, Ellis & Co. seem to have abandoned all claim to the bank stock; and, on the other hand, Baldwin and Green ask nothing in regard to the assets pursued by Conant, Ellis & Co.

As to the claim of Baldwin & Green, the facts, so far as it is necessary to state them in the view we take of the case, are as follows:

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The defendant, Reed, being the owner of sixty shares of the capital stock of the Seneca Bank, on which sixty per cent., amounting to \$3,600, had been paid by his written assignment of January 15, 1848, transferred the same to said Jacob Green and Joshua Baldwin, as collateral security for the payment of a note of \$5,000, made by him, and them as his sureties to the Franklin Branch of the State Bank. The object of the assignment was to indemnify Green & Baldwin against loss; and at the time of delivering it, Reed also delivered to them his certificate of stock. It is not pretended that 300] the Seneca Bank had any notice of this assignment until August 4, 1848. On that day, as Reed testifies, he informed the defendant Arnold, the cashier of the bank, that he had made the assignment; and he further swears that, with Arnold's consent, he then transferred the stock to Baldwin & Green, on the transfer book of the bank. At the time of this transaction, Reed was a director of the bank, and largely indebted to it. The circumstances of the transfer are thus stated by him:

"Sylvanus Arnold, cashier of the bank, stated to me that, in order to make up his report as cashier, it was necessary that some one or more of the directors or stockholders who were indebted to the bank should transfer their stock, in order that he might so state the liabilities of the directors and stockholders, that their liabilities should come within that section of the law requiring that they should not be liable as principals or indorsers to a certain extent; and, in order to enable him to make up his report agreeably to law, he requested me to transfer my stock in a confidential manner. I then stated to him that I had then pledged and transferred my certificate of stock to Joshua Baldwin and Jacob Green, who had become liable for me as indorsers on a note previously discounted at the Franklin Branch Bank at Columbus, in the sum of \$5,000; that I would transfer the stock to these parties in accordance with an arrangement previously made with them, and declined transferring it to him, or any other person. This transfer was accepted by said Arnold, cashier of said bank. The said Arnold then produced the transfer-book, and the stock was transferred to these parties, he fully consenting to the assignment, and the transfer was made in the transfer-book and was left in the said bank."

On cross-examination, the witness swears: "Mr. Arnold requested me, as before stated, in order that he might be able to make up his report, to transfer the said stock to him; that it should be a confi-

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dential matter; that he would cut it out of the transfer-book. This suggestion I positively declined, and then stated the facts heretofore set forth of the transfer having been previously made to Green and Baldwin. I did not *request him to place the same [301 among his private papers—this was a question coming directly from himself, when he made the suggestion of a transfer to himself—there was no understanding that any other disposition should be made of this transfer certificate, other than the transfer itself set forth.”

Tomb and Arnold, the president and cashier of the bank, have answered; and, by agreement, their answer is to be taken as the answer of the bank also. They deny that they, or the bank, had any notice of the assignment to Baldwin & Green before November 17, 1848. They also deny that said transfer of August 4 was ever consented to by the directors of the bank or a majority of them, and assert it was not known to any of the directors, except Reed who made it, until November 17, 1848. They aver that it was a pretended transfer, made under the following circumstances: “On the 15th of July, 1848, respondent Arnold had been chosen cashier of said bank, and had not become familiarly or fully acquainted with his duties as such cashier, nor of the true nature or extent of the liabilities of the directors thereof to said bank, either as the principal debtors or securities for others, or otherwise; and being required by law to make report to the auditor of state early in August, 1848, and being anxious to obtain payment on notes and bills due to said bank, and especially those due from directors and stockholders, for the purpose of making as favorable a report as the facts would authorize, he called on said Reed, who was then a director of said bank and largely indebted thereto, and requested and urged him, said Reed, to make payment of the whole or a part of his said liability; to which respondent Reed replied to the respondent Arnold, that he was about to make arrangements to pay all his debts, and particularly those due said bank, and agreed that if he failed to make such payments by the time said Arnold would be required to make out said report, that he, the said Reed, in such event, would assign his stock in said bank to the said Arnold, to enable him to make such report, and that he, *said Arnold, should [302 reassign the same upon receiving payment of the debts of said Reed to said bank. That this arrangement was made prior to August, 1848, and shortly after the respondent Arnold assumed the duties

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of cashier. That afterwards, on the 4th of August, 1848, the said Reed having failed to make payment as aforesaid, for the purpose of enabling respondent Arnold, as such cashier, to make the report aforesaid, attempted to assign said sixty shares of stock to said Green & Baldwin, instead of making the same to said Arnold for the use and benefit of said bank. That said Reed represented said Green & Baldwin as his personal and confidential friends; that he did not wish it to be made known to any one that such transfer had been made, and that he would shortly arrange his matters with said bank in a satisfactory manner. That, at the urgent request of said Reed, respondent Arnold, as such cashier, and not then being a director of said bank, consented thereto, and such pretended assignment was made on a blank taken from the transfer book of said bank, by filling up such blank; which blank, so filled up, at the instance and urgent and repeated request of said Reed, was, after being taken from such transfer book, placed by respondent Arnold among his own private papers in his pocket to be held by him, the said respondent Arnold, in trust for said bank until the indebtedness of said Reed thereto should be paid; which payment said Reed then assured said Arnold should be made in a very short time. Respondent Arnold denies that such pretended transfer was for the benefit of said Green & Baldwin, but for the benefit of said bank as aforesaid."

The answer further states that, on August 7, 1848, the date of the report to the auditor of state, "the liability of stockholders and directors in said bank thereto, including the liability of said Reed in the premises, was \$17,593.55, when by law said liability might have been \$18,000. But as said Reed had so pretended or attempted to assign his stock as last aforesaid, respondent Arnold did not include his liability as among the liabilities of stockholders to said bank."

303] *These statements in the answer are substantially repeated in the deposition of Arnold, who was called as a witness by the complainants.

It further appears that Reed's indebtedness aforesaid was carried into judgments on August 26, 1848, which judgments were, on August 31, 1848, fully paid and satisfied out of the proceeds of the discount by the bank, on that day, of three acceptances of Carrington & Pardee, of New York, which Reed then held and indorsed to the bank, and a note for \$2,000, then made by Reed and others to

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the bank; which acceptances and note Reed procured to be so discounted. It is expressly averred, in the answer of the bank, that the judgments were so paid, and that, by order of the bank, a return of *satisfaction* was made on the executions that had been issued thereon. It also appears by Reed's testimony that he failed to discharge said note to the Franklin Bank, and that Baldwin & Green were under the necessity of paying \$3,600 thereof, being the same amount that had been paid on the bank stock aforesaid; under which circumstances, the stock has been considered and treated by him and them as belonging to them, and he makes no claim thereto, and swears that he has no interest therein.

Upon this state of facts, the first question that arises is, Was the transfer of August 4, 1848, to Baldwin & Green, valid? We have no difficulty upon this point.

The 46th section of the Banking Law (43 Ohio L. 43) enacts that "The capital stock of each banking company shall be divided into shares of one hundred dollars each, and shall be assignable on the books of the company, in such manner as its by-laws shall prescribe; but no shareholder shall have power to sell or transfer any shares, held in his own right, so long as he should be liable, either as principal debtor, surety, or otherwise, to the company, for any debt which shall have become due, and remains unpaid; nor in such case shall such shareholder be entitled to receive any dividend, interest, or profit on such shares, so long as such liabilities shall continue; but all such dividends, interests, or *profits, shall be [304 retained by the company, and applied to the discharge of such liabilities; and no stock shall be transferred, without the consent of a majority of the directors, while the holder thereof is indebted to the company."

These provisions are designed to protect the bank by giving it a lien on the shares of its stockholder for the amount of his indebtedness to it, which he shall not be allowed to defeat by a transfer of his stock, without the consent of a majority of the directors, nor even with their consent, if his debt is overdue and unpaid. True, it is provided, by the 47th section of the act, that "No banking company shall take, as security, for any loan or discount, a lien upon any part of its capital stock; but the same security, both in kind and amount, shall be required of shareholders," etc. But this is entirely consistent with what we have said. The intent of the act is to give the bank a double security where a stockholder is the

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debtor: first, the same security that persons not stockholders are required to give: secondly, a lien upon his stock. These are wise provisions, tending to protect the bank and the public against the consequences of improvident or dishonest loans to irresponsible stockholders. It is judicious and right to require more security of a shareholder than of another person; and giving a lien on his stock is only carrying out the principle that obtains in ordinary partnerships, that the interest of the partner is what remains after deducting his debts to the firm.

As the bank, then, on August 4, 1848, held a lien on Reed's stock for his indebtedness, he could not defeat that lien by a transfer, without the consent of a majority of the directors, if the debt had not matured; nor with their consent, if it was overdue.

It is contended for the complainants, that such consent should be presumed from the facts that are in proof; but we do not think the testimony warrants it. This, however, is not material; for it appears by Reed's deposition that part of his indebtedness was then overdue and unpaid; so that he had no power, on August 4, 1848, even 305] with the directors' assent, to transfer his stock. We are therefore clear that the legal title to the stock did not pass to Baldwin & Green by the attempted transfer on that day.

The next question is, Did Baldwin & Green take any interest in the stock by the assignment of January 15th? On the part of the bank it is argued that no interest, legal or equitable, can be conveyed except by a transfer made on the books of the bank pursuant to the statute. For the complainants, it is contended that, though such a transfer is necessary to pass a legal title, an equitable title may be otherwise transferred.

We are of opinion that the position of complainants is sustained by both reason and authority. The object of the statute, as we have already said, is to protect the bank by giving it a lien on the stock, or, rather, this is the main purpose; for there are other useful ends attained by requiring transfers to be made on its books. It preserves them in a durable and convenient form, and enables the bank and purchasers to know, with certainty, who are the legal holders of its stock, and who, *prima facie*, are entitled to its dividends.

But it never was intended that, while, in respect to all other property, the legal title may be in one person, and the equitable title in another, as to bank stock, both legal and equitable title must be vested in the same individual. This anomaly would be the neces-

sary result, were we to adopt the reasoning of the counsel for the bank. But such a position is contradicted by a multitude of cases that might be put, and by the bank charter itself, which, in the very section under consideration, recognizes the right of one person to hold stock in trust for another, by the provision that "no shareholder shall have power to sell or transfer any shares, *held in his own right*, so long," etc. Again, suppose a devise of stock; does the devisee take no interest until the stock is transferred to him on the books of the bank by the executor? Is any such transfer necessary? Does the stock go to the executor at all? Is not the devisee the owner of it, and has he not a right, upon probate of the will and surrender of the *testator's certificate, to demand [306 and have a new certificate issued to himself, provided the testator's estate is not indebted to the bank?

Or, take a case of intestacy. Has the administrator no right to the stock of the deceased until it is regularly transferred to him on the transfer book? Or, has an assignee under the insolvent laws no interest in such stock before it is so transferred to him? Or, can no lien be acquired upon it by a creditor's bill?

Other illustrations might be given, but these are quite sufficient to show that an assignment on the books of the bank is not the only mode by which an interest in stock may pass. Possibly it is the only mode of transfer by which the lien of the bank can be extinguished. But, subject to that lien, the stock may be otherwise transferred; and though the legal title may not pass, an equitable title will. And the bank is bound to respect such equitable title from the time it receives notice of its existence. These views are fully sustained by the authorities. See *Bank of Utica v. Smalley*, 2 Cow. 777; *Gilbert v. Man. Iron Co.*, 11 Wend. 628; *U. States v. Cutts*, 1 Sumn. 139; *Com. Bank of Buffalo v. Kortwright*, 22 Wend. 362; *Quiner v. The Marblehead Ins. Co.*, 10 Mass. 476; *Sergeant v. Franklin Ins. Co.*, 8 Pick. 90; *Union Bank of Georgetown v. Laird*, 2 Wheat. 390, and *Black et al. v. Zacharie & Co.*, 3 How. 483.

The next inquiry is, When did the bank receive notice of the assignment of January 15 to Green & Baldwin?

Reed swears that he informed the cashier, Arnold, of it on August 4, 1848. Arnold swears that he did not, and that the bank had no notice of it until in November following. Here then we have witness against witness, and we must determine, by the circumstances and reasonable probabilities of the case, whose statement is correct.

The complainants disclaim any intention to question Arnold's character for truth, as he was called by them to testify; but this does not relieve us from the necessity of deciding, as well as we are 307] *able, which of the witnesses is in error; nor does the law require of us so impossible a thing as that we should put implicit confidence in witnesses whose own statements place them in, to say the least of it, a very suspicious attitude. Reed says that the attempted transfer on the books of the bank, on August 4, was a *bona fide* attempt on his part to fully execute his agreement with Baldwin & Green. Arnold flatly denies this, and says it was a mere "pretended assignment," to enable him, Arnold, as cashier, to make the report required by law.

Now, let us see what was this report, thus required:

The 59th section of the banking law enacts that "on each dividend day the cashier shall make *and verify by his oath* a full, clear, and accurate statement of the condition of the company as it shall be on that day, after declaring the dividend; and similar statements shall also be made on the first Monday of February and August in each year." It then declares what particulars the statement shall contain, among which are the following: "The total amount of the liabilities to the company, by the directors thereof, collectively, specifying the gross amount of such liabilities as principal debtors, and the gross amount as indorsers or sureties."

"The total amount of the liabilities to the company, of the stockholders thereof collectively, specifying the gross amount of such liabilities as principal debtors, and the gross amount as indorsers or sureties; which statement shall be forthwith transmitted to the auditor of state."

The reason of these provisions is found in the fact that the charter restrains the directors and stockholders from becoming liable beyond a certain amount. Now, if the transfer of August 4 was a mere sham, it left Reed just where he was before making it, namely, a stockholder and director largely indebted to the bank. His indebtedness ought, therefore, to have been included in the report; yet, Arnold admits that it was not so included. Indeed, take Arnold's own statement, and it shows that he sought from Reed a pretended transfer to himself, to enable him to leave out Reed's indebtedness. In view of these facts, charity herself can go no 308] further than *to admit the excuse given by him in his answer, when he says that he was not "fully acquainted with his duties as

such cashier." A better acquaintance with his duties would have taught him that it was no part of them to get pretended transfers to enable him to make reports, under oath, seemingly true but actually false.

Nor does Reed place himself in an attitude entirely above suspicion. True, he denies that he made any pretended transfer or attempted to make one; but, on the other hand, he admits that the president of the bank had stated to him "that it would be necessary for some of the stockholders to transfer their stock, in order that a report might be made," and that "it was understood, and was a matter of conversation among the directors generally, that some stock must be transferred in order that he (the cashier) could make a report; yet it does not appear that the witness' sensibilities were at all shocked by such a proposition. It is not a pleasant thing to find the determination of important rights dependent upon a discovery of the truth, from testimony so uncertain and conflicting; and we are fully aware that the most we can do is to ascertain whether the evidence preponderates upon one side or the other. We think, after the most careful investigation and reflection, that the weight of testimony is on the side of the complainants. The reasons given by Arnold, why the attempted transfer of the 4th of August was to Baldwin & Green, are not as satisfactory as those stated by Reed; and it is more charitable, to say the least of it, to suppose that Arnold, when he reported under oath to the auditor, believed that Reed had effectually conveyed his stock, than to impute to him the crime involved in a willful making of a false report.

Upon this branch of the case, then, we are of opinion: 1. That the assignment of January 15, 1848, to Baldwin & Green, is good in equity. 2. That notice of it was given to the bank on August 4, 1848—notice to the cashier being, in our opinion, notice to the bank. 3. That the present indebtedness of Reed to the bank accrued after the receipt of said *notice. 4. That Baldwin & [309] Green made the payments aforesaid to the Franklin Bank.

It follows that the complainants, Baldwin & Green, are entitled to a decree for a transfer of said stock to them, and also for the dividends that have accrued thereon since August 4, 1848.

We are next to consider the claim of Conant, Ellis & Co. The assets which they seek to subject to the payment of their judgment are certain lands, or their proceeds, which were conveyed by the defendant Reed to Abel Rawson, in trust for the benefit of the de-

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fendant Hitchcock, and subsequently, pursuant to an agreement made between Reed, Hitchcock and the bank, conveyed by Rawson to the defendants, Tomb and Arnold, to satisfy, as they (T. & A.) allege, two of Carrington & Pardee's acceptances which Reed had procured to be discounted by the bank as before stated; the remaining acceptance having been paid by the acceptors. The bank took the land at \$6000, and paid for the same by cancelling and delivering up said two acceptances, amounting, with interest, etc., to over \$4000, and paying to Hitchcock the residue. Subsequently Tomb and Arnold, holding the legal title and acting for the bank, sold the lands for less than \$6000, receiving part of the consideration in hand, and notes for the residue; which proceeds, or the lands themselves, Conant, Ellis & Co. pray may be subjected to the payment of their claim. They place their right to this relief on the ground that Reed's indebtedness to the bank was incurred in violation of its charter, whence they argue that the bank's claims upon him were void, and it can not have the benefit of any trust created for their payment, or retain any money or property paid in absolute discharge of them. The provision in the charter to which we are referred is in these words: "The stockholders, collectively, of any independent banking company, shall, at no time, be liable to such company, either as principal debtors or sureties, or both, to an amount greater than three-fifths of the amount of capital stock actually paid in, and remaining undiminished by losses 310] *or otherwise; nor shall the directors be so liable, except to such amount, and in such manner as shall be prescribed by the by-laws of such company, adopted by its stockholders to regulate their liabilities."

It is admitted that no such by-laws were adopted by the stockholders of the Seneca Bank until 1850. The indebtedness to pay which said lands were conveyed to Tomb and Arnold was incurred by Reed, August 31, 1848, when, as complainants allege, and the bank admits, he was a director. There is some uncertainty, however, whether he was a director at that time. He had assigned his stock to Baldwin & Green, as before stated; and the charter provides that "each director shall own, in his own name and right, at least one per centum of the capital stock of the company." Besides this, he swears that he never acted as director after August 4th.

But let it be assumed that he was a director, we are by no means prepared to say that his indebtedness to the bank was a nullity. We are admonished by counsel, that, unless we so hold, the provision

in the charter is a dead letter, and the consequences may be disastrous; but we can not admit the soundness of either of these propositions. Indeed, it would be easy to show that much more fatal consequences would result from the construction contended for by the complainants, and that it would place both stockholders and the public at the mercy of dishonest directors. And so far is the provision upon either construction from being a nullity, that its willful violation is possibly a sufficient cause for a forfeiture of the charter, and renders each director who knowingly participates in or assents to, the same individually liable for all damages which the company, its shareholders, or any other persons, body politic or corporate, shall have sustained in consequence of such violation. 43 Ohio L. 50, sec. 66. Now it would be rather an odd construction to hold that the loan to the director gives no right of action, when not only he, but also the directors who made the loan in wilful violation of the charter, are made responsible by the 66th section, *above [311 cited. Again, as between a bank and its directors, the latter are but agents; and what court has ever permitted an agent to set up his own misconduct toward his principal to defeat the latter's right of recovery against him? And in what better position is a mere creditor of the agent who has sustained no loss by the misconduct in question?

But it is unnecessary for us to decide whether the debt was a nullity; for let it be granted that the bank could have sustained no action for the recovery of the money loaned, or upon the securities taken, what equity does that confer upon the complainants? The bank parted with its money to Reed, and he repaid the bank in land. That the land was conveyed and accepted in absolute payment, there can be no doubt. So the defendants, Tomb and Arnold, swear in their answer, and the testimony supports them. The acceptances indorsed by Reed were canceled and given up, and the bank, pursuant to its agreement, paid to Hitchcock the remainder of the consideration of the conveyance. Where is the wrong in this? Was it immoral, illegal, or against public policy for Reed to repay money he had actually received from the bank? Were the complainants injured by the loans the bank had made to him, and had they a right to say he should not make payment? How is it where usury laws prevail? A usurious debt can not be recovered. It is declared by the statute to be void; but has it ever been held that a creditor at large of the borrower can recover the

money paid in discharge of it? It is contended, however, that the complainants are not creditors at large; that they have filed a creditor's bill, and therefore have a right to prevent the bank from receiving payment out of the proceeds of the lands; and we are referred to a *dictum* in *Green v. Morse*, 4 Barb. 343, to the effect that a creditor who had proceeded to judgment and execution against the assignor, and thus seized the assigned property, or filed a creditor's bill against the assignor and assignees to set aside the assignment as fraudulent against *bona fide* creditors, for the reason that it provided for the payment of usurious and void debts, would [312] not be estopped from assailing the provisions of the assignment made in favor of debts affected with usury, as a creditor coming in under the assignment clearly is.

It is not necessary for us to gainsay this doctrine. A usurious borrower is not estopped to set up the usury by way of defense, and every one in privity of blood or estate with him may make the same defense, though a mere stranger or creditor at large can not. And it may be that a creditor who has seized property in execution, or filed a creditor's bill to reach it, is in such privity of estate that he may go into chancery to set aside an assignment of it in trust to pay a usurious debt. But even in that case it might be a serious question whether the usurious lender would not be entitled to receive the sum actually loaned, upon the principle that he who goes into equity must do equity. If the borrower himself seeks relief in equity against a usurious contract, it is well settled that it will be afforded only upon condition that he pay what in good conscience he ought to pay; and it will perhaps be difficult to see why a creditor of the borrower should stand in a better position in this respect than the borrower himself.

But here it is not necessary to estop the complainants to allege the illegality of Reed's debt. The debt was not immoral, and it has been paid. True, the lands were not conveyed directly to the bank. The conveyance was made to the president and cashier; but it was none the less a payment. It was not a conveyance upon trusts to sell the property, and out of the proceeds pay the debts; but the debt was paid by the conveyance itself. The evidences of indebtedness were canceled and given up, and the bank, in lieu thereof, became in equity the owner of the lands. When this took place, the complainants were creditors at large. They had neither seized the property in execution nor filed their bill.

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They do not, therefore, come within the *dictum* above cited from *Green v. Morse*. On the contrary, it is expressly laid down in that case as clearly settled law, that money or property paid in discharge of a usurious debt *can not be recovered back by the [313] debtor; and it is plainly deducible, from what was said and decided by the court, that no such recovery can be had by a creditor of the usurious debtor, unless such creditor had acquired a lien upon the money or property before the payment. And so we understand the law to be.

We have carefully examined the cases cited by complainants' counsel; but they do not, in our opinion, contravene the views we have here expressed. It follows that Conant, Ellis & Co. are not entitled to the relief they seek, and the bill, so far as they are concerned, must be dismissed.

As the complainants say that they ask no decree against the defendants, Hitchcock and Pennington, I have not thought it necessary to refer to them particularly.

Decree accordingly.

THE PREBLE COUNTY BRANCH, IN EATON, OF THE STATE BANK
OF OHIO v. WILLIAM RUSSELL AND OTHERS.

The principal in a note, sued jointly with his sureties, who suffers a default, and against whom a separate judgment is entered, is a competent witness for such sureties, upon the issue joined between them and the plaintiff.

A note or other obligation taken by a bank limited by its charter to six per centum interest on its loans, is void if more is reserved or taken, not only upon general principles, for the want of corporate power to enter into such contract, but by the express provisions of the 61st section of the act to incorporate the State Bank.

The 9th section of the act of February 24, 1848 (46 Ohio L. 91), suspended the right to make such defense, but allowed an action against the bank to recover the money for the use of schools. The repeal of this law in 1850 restored the right to defend.

The law of 1848 only operated upon the remedy, still leaving the contract void and expressly forfeited; and consequently its subsequent repeal, and the revival of the right to defend did not in any manner affect or impair any provision of a valid contract.

ERROR to the common pleas of Butler county, reserved in the district court in that county for decision by the supreme court.

314] *The action below was assumpsit by the plaintiff in error against the defendants, William Russell, James Benham, John Panley, and Christian Failor, on two promissory notes made by them, payable to the plaintiff; one dated December 16, 1848, at ninety days, for \$2600, payable at the Franklin Branch Bank in Cincinnati; the other dated February 15, 1849, at ninety days, payable at the Ohio Life Insurance and Trust Company in Cincinnati. The defendants, Benham, Panley and Taylor, pleaded *non assumpsit*. The other defendant, Russell, was in default.

At the February term, 1852, of the common pleas of Butler county, Russell, having been called and defaulted, judgment was entered against him by consent, the record being in these words: "Whereupon, by consent of the said William Russell and the said plaintiff, it is considered that the said plaintiff ought to recover his damages by reason of the premises; and neither of the parties requiring a jury, the court being fully advised in the premises, do assess the damages of said plaintiff against said William Russell to \$3550. Therefore it is considered that the plaintiff recover against said William Russell the said sum of \$3550, its damages aforesaid assessed, and also its costs, etc."

A jury was then sworn to try the issue joined between the plaintiff and the other defendants, who found for the defendants, and as to them judgment was rendered against the plaintiff; to reverse which the present writ of error is prosecuted.

In the progress of the trial before the jury, a bill of exceptions was tendered by the plaintiff to the rulings of the court, which was sealed and made part of the record.

It appears, from the bill of exceptions, in substance, that the plaintiff gave the notes in evidence to the jury; also, a certificate by the secretary of the board of control of the State Bank of Ohio, of the acceptance by members of said board, representing more than a majority of the stock of the State Bank of Ohio, of the first four sections of the "Act in relation to the State Bank of Ohio and 315] other banking *companies," passed February 24, 1848 (46 Ohio L. 92). To which evidence it does not appear that any objection was made by the defendants; and thereupon the plaintiff rested.

It further appears by the bill of exceptions, that the defendants

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who filed the plea, to sustain the issue on their behalf, introduced their co-defendant, Russell, who was in default, and against whom judgment had been rendered, as a witness, and offered to prove by him that he was principal debtor in the notes, and the other defendants, so calling him, his sureties; and that the notes were made and given to the bank, for and upon a usurious loan of money by the bank to Russell.

The plaintiff objected to the competency of the witness, but the objection was overruled, and the witness gave evidence to the jury tending to prove the transactions on which the notes were given to be usurious. It further appears from the bill of exceptions, that the defendants offered in evidence the deposition of John W. Benson, a teller in the plaintiff's bank, also tending to prove the transactions on which the notes were founded usurious; to the reading of which the plaintiff objected; but the objection was overruled, and the deposition read to the jury.

The plaintiff excepted to the opinions and rulings by the court, as above stated; and, after the verdict, moved the court for a new trial, amongst other reasons set forth in the record, because, as was claimed by the plaintiff, the court erred in charging the jury "that the defense of usury might be set up to defeat the plaintiff's right to recover on the notes offered in evidence, and that the testimony of the witnesses, Benson and Russell, was competent," etc.

It is now assigned for error:

1. That the court erred in admitting William Russell to testify as a witness; and,

2. In admitting the testimony of Benson and Russell as to the transactions on which the notes were founded, and in charging the jury that the defense of usury could be set up by the defendants to defeat a recovery in this action.

**Ewing & Hunter*, for plaintiffs in error.

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Probasco & Ward, for defendants: *Worrall v. Jones* and others, 20 Eng. Com. Law, 177; *Willings v. Consegua*, 1 Pet. 301; 16 Pick. 501; 42 Eng. Com. Law, 988; 42 Ohio Laws, 72; *Fullerton v. Bank United States*, 1 Pet. 616; *Bank of Chillicothe v. Swayne*, 8 Ohio, 287; *Bank United States v. Owens*, 2 Pet. 527.

RANNEY, J. The questions presented in this case are correctly stated in the printed argument of counsel for the plaintiff in error to be, first, Whether William Russell was a competent witness to be

called in behalf of his co-defendant? Second, Whether the defense of usury could be set up in the case? But they are incorrect in saying the "jury was sworn to assess the damages on the default of the defendant, Russell, and to try the issue joined on the plea of the other defendants." On the contrary, it appears by the record, that Russell made default, "whereupon, by consent of the said Wm. Russell and the said plaintiff, it is considered that the said plaintiff ought to recover, etc.; and neither party requiring a jury, the court assess the damages against him at \$3550, for which judgment was rendered, and thereupon came a jury to try the issue joined between the plaintiff and the other defendants."

I. This being the position of Russell, at the time he was called as a witness, it becomes wholly unnecessary to consider the regularity of the judgment obtained against him. The plaintiffs can not object to it, for it was taken at their instance; nor can Russell, for it was taken by his consent; *volenti non fit injuria*. Under these circumstances, was he a competent witness upon the trial of the issue to which he was not a party? It is not to be denied that this has been considered very much of a vexed question in courts proceeding upon common law principles alone. The elementary books upon evidence generally lay down the doctrine of exclusion; and cite, in its support, the cases of *Mant v. Mainwaring*, 8 Taunt. 139, and *Brown v. Brown*, 4 Taunt. 752.

317] *But if these writers have drawn the correct conclusion from these cases, it is very clear that their authority has been very much shaken, if not entirely overthrown by more recent cases in England.

In the case of *Worral v. Jones*, 7 Bing. 395, which was an action on a bond, the principal suffered judgment by default, and was admitted as a witness for the plaintiff against the other defendant, his surety; he having no interest in the event. Chief Justice Tindal remarks: No case has been cited, nor can any be found in which a witness has been refused upon the objection, in the abstract, that he was a party to the suit; on the contrary, many have been brought forward in which parties to the suit, who have suffered judgment by default, have been admitted as witnesses against their own interest, and the only inquiry seems to have been, in a majority of the cases, whether a party called was interested in the event or not.

The direct question here made was involved in that case; since,

if the witness was not admissible for the co-defendant, he was not admissible against him. 1 Greenleaf's Ev. 399.

This case was reviewed, and the question again considered, in the case of *Pipe, Ad'mr. v. Steele*, 42 E. C. L. 888. Harvey & Steele were defendants; Harvey suffered judgment by default, Steele pleaded; the action was assumpsit; Harvey was tendered as a witness and admitted. The case was reserved upon this point: Lord Denman, C. J., remarked: "The objection that he is a party to the record which prevailed in *Brown v. Brown*, and *Mant v. Mainwaring*, has been deliberately overruled in *Worrall v. Jones*, a case of great authority, in which the Lord Chief Justice Tindal gave the unanimous judgment of the common pleas, that a party to the record may be examined as a witness, provided he be disinterested; we are to decide, therefore, whether such a defendant is disinterested."

Again, in 61 E. C. L. 24, the action was upon a joint contract against one of the contractors; there being no plea in abatement, it was held that a co-contractor against *whom a previous [318 judgment had been reversed upon the same cause of action was a competent witness for the plaintiff."

These decisions were based upon the common law, and were not influenced or affected by any recent statute.

They very conclusively show that the ground of exclusion in the English courts, at this time, arises alone from interest in the event. Entirely consistent with this, is the case of *Willings v. Consegua*, 1 Pet. 301, where Judge Washington remarks: "The general rule of law certainly is that a party to a suit can not be a competent witness. But it is equally so that the interest which that party has in the event of the suit, both as to costs, and the subject in dispute, lies at the foundation of the rule; and when that interest is removed, the objection ceases to exist."

It is, however, but candid to state that several American cases, following the older English authorities, can be found in which the exclusion is placed upon broader ground, and supposed to arise from considerations of policy.

An examination of the reasons for the rule, and the exceptions to its operation, as stated by Mr. Greenleaf, will show that in its utmost rigor it could not avail in the present case. This author, after stating the general rule to be "that, when the suit is ended as to one of several defendants, and he has no direct interest in its

event as to the others, he is a competent witness for them, his own fate being at all events certain," proceeds to say: In *actions on contracts*, the operation of this rule is generally excluded; for the contract being laid jointly, the judgment by default against one of several defendants will operate against him only in the event of a verdict against the others." 1 Greenl. Ev. sec. 356.

But certainly this reason can have no application where a judgment is actually entered by his consent, thereby precluding him from ever disturbing it. His fate is then, "at all events certain," whatever may be the result as to his co-defendants. He then comes fully within the reason given for the exception laid down in the 319] same section, where one of *several defendants pleads a matter of personal discharge, and the plaintiff, as to him, enters a *nolle prosequi*. In such case, it is said, "such defendant is no longer a party upon the record, and is therefore competent as a witness if not otherwise disqualified."

That Russell had no interest in the event, or, if any, that it was adverse to the parties calling him, seems to us very evident. His own liability was already fixed, and could be neither enlarged nor diminished. If anything favorable to himself could have been affected by his testimony, it would have been by denying himself to have been principal in the obligation, and charging his co-defendants, so as to have forced contribution from them. But whether interested or not is entirely immaterial if he was no longer a party to the action, within the meaning of our act to improve the law of evidence. And we are of opinion he was not. This construction of that act is not only consistent with its language, but is in harmony with the general policy of our legislation, which has, from time to time, abrogated the common law rules of exclusion, until scarcely any remain.

II. If the evidence given was admissible, it is not denied that a case of usury was made, and the jury so found. But it is insisted that this defense could not be made. This position is based upon the 4th section of the act of the 24th of February, 1848, by which it was provided that the forfeiture specified in the 61st section of the act to organize the State Bank, etc., should "only be established by an action in the name of the person or persons from whom the illegal interest has been taken; and the amount, when recovered, shall go to the use of common schools of the proper county." 46 Ohio L. 92.

This section of the act of 1848 was repealed by the first section of an act passed March 19, 1850, 48 Ohio L. 35, and the 61st section of the bank law, so far as it might have been repealed by the act of 1848, was revived. Between the enactment and repeal of the act of 1848, the notes sued upon *in this case were given; [320 although the suit was not commenced until some time after the repealing act was passed. It is claimed that the act of 1848 entered into and made a part of the contract between the parties at the time it was made, and could not be changed by subsequent legislation, without impairing its obligation.

Whether this position is tenable or not must depend upon the question whether this law affected the contract or only the remedy. It is certain the legislature had no power to make a contract, legal when made, illegal by subsequent legislation; and equally certain that the remedy merely, for the enforcement of prior as well as subsequent contracts, is at all times subject to its control. The plaintiff is bound to establish the existence of a valid contract of binding obligation as an indispensable predicate upon which to found the claim that its obligation has been impaired. If there was no contract, or, what is the same thing, only a void one, there was no obligation to be impaired.

Independently of the statute of 1848, it will be readily admitted that these notes were illegal and void. The bank was expressly limited by its charter to six per cent. interest; and if the charter had been silent, as to the effect of taking more, the leading cases of the *Bank of the United States v. Owens*, 2 Pet. 527, and *Bank of Chillicothe v. Swayne*, 8 Ohio, 277, followed and approved in many later cases in this state, would fully warrant the conclusion that the notes were void for want of corporate power in the bank to enter into such a contract.

The 61st section of the bank law also expressly declares, that "the knowingly taking, reserving, or charging, on any debt or demand made payable to such company, of a rate of interest greater than that allowed by this section, shall be held and adjudged a forfeiture of such debt and demand." 43 Ohio L. 49.

*Whether this section was intended to do more than affirm [321 the judicial doctrine already established, it is unnecessary to say: it certainly can not be held to do less, and give it any effect whatever. Whether, therefore, these notes are considered upon general principles, or upon the express provisions of the charter of the bank,

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they must be regarded as illegal and void ; being made by a corporation not only without authority of law, but in positive violation of it.

The act of 1848 did not attempt to authorize or legalize such contracts. It still left them illegal, void, and expressly forfeited as before. Indeed, the whole provision is predicated upon the assumption that the debt or demand is forfeited ; and it then proceeds to provide in what manner the forfeiture shall be established and what disposition shall be made of the amount. Fairly construed, it took away or suspended the right to establish the illegality and consequent forfeiture, by way of defense to an action brought upon the contract, which would leave the fund in the hands of the debtor ; and authorized its establishment only in an action brought against the bank, and gave the fund recovered to the use of the common schools. In other words, the facts which establish the illegality and work the forfeiture shall not be shown by defense, but by action. The forfeiture, when established, shall not inure to the benefit of the debtor, but to the use of common schools.

In all this it is impossible to see more than a modification of the machinery by which the same end is attained. No right of the bank was affected by the repeal of this act ; for neither this act nor the charter recognized the bank as having any rights, growing out of such a contract, to be affected. The illegal act done, the penalty, a forfeiture, immediately ensued under either. The bank had no right to any part of the money evidenced by such a contract. Before the act of 1848 it could not legally come into their hands ; after that act, if it came into their hands, they could not for a 322] *moment legally hold it. We are, therefore, clearly of the opinion that the act of 1848 operated only upon the remedy ; and after its repeal, is to be regarded as though it had never existed, in respect to proceedings afterwards had. What is the consequence ? The plaintiff sued upon void obligations. The defendants, no longer under disability to do so, offered to show, and did show, the fact. This constituted a perfect defense, and the court of common pleas did right in giving it effect.

Judgment affirmed.

THE COMMISSIONERS OF PUTNAM COUNTY v. THE AUDITOR OF ALLEN COUNTY.

Where the legislature has erected a new county out of territory formerly belonging to other counties, and, to compensate such counties for the loss of territory occasioned by the erection of the new county, has added territory to them from adjoining counties, it is competent for the legislature to provide that the county receiving the accession of territory shall pay an equitable proportion of the indebtedness of the county from which such territory has been taken; and the provision of the statute creating the county of Auglaize, which requires Allen county to pay a portion of the debts of Putnam county, is valid.

Mandamus will not lie to compel the auditor of a county to draw an order on the treasurer of the county where the auditor has not the right to fix the amount to be drawn for, unless such amount has been ascertained and liquidated.

Where the auditor has not the power to fix the sum for which the county is to be chargeable, he can not, by any admission, in a proceeding by mandamus, bind the county, in reference to the amount of liability.

THIS is an application for the allowance of a peremptory mandamus to the auditor of Allen county, requiring him to draw an order on the treasurer of that county for the payment of a portion of the indebtedness of Putnam county. The obligation to pay this indebtedness, is claimed to have been imposed upon Allen county by the provisions of the act *to erect the county of Auglaize, [323 46 Ohio Local Laws, 128. The alternative writ was allowed by the late supreme court on the circuit, to which the auditor of Allen made return. Subsequently the return was amended so as to present for determination the single question of the constitutionality of the act before referred to. The case is fully stated in the opinion of court.

McKenzie & Nicholls, for relators.

Rose, for defendant.

CALDWELL, J. The controversy in this case arises in reference to a claim set up by Putnam county against Allen county for a sum of money, which, it is claimed, is due from Allen to Putnam county, by virtue of the provisions of the statutes creating the county of Auglaize. A large portion of the territory of Allen

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county was taken for the purpose of erecting the new county of Auglaize; and in order to compensate Allen county for the territory thus lost, a portion of Putnam county was added to Allen. The county of Putnam was largely indebted at the time. And, in order to enable Putnam county to retain her capacity to pay off her debt, and to do justice in the premises, the legislature provided as follows: "That the commissioners of the counties of Allen and Putnam shall meet on or before the first Monday of April next, or within sixty days thereafter, and ascertain and determine the amount of the public debt of Putnam county, exclusive of that for the surplus revenue loaned to said county, and the proportion which the value of the taxable lands set off by this act to the county of Allen from the county of Putnam bears to the value of the taxable lands by this act remaining in Putnam county; and hereafter each year, until the public debt aforesaid shall be paid off and discharged, there shall be paid out of the treasury of Allen county, upon the order of the auditor thereof, to the treasurer of Putnam county, a sum which shall bear the same proportion to the amount raised in that year by Putnam county for the payment of the debt 324] aforesaid, as the value of the *taxable lands so set off as aforesaid, bears to that of those so as aforesaid remaining in Putnam county; and the same shall be applied to the extinguishment of said debt, and to no other purpose; and it shall be the duty of the commissioners of Allen county to levy a sufficient tax to raise said sum." 46 Ohio L. L. 128, sec. 12.

Within the time prescribed by the statute, the commissioners of Putnam county met at Kalida, having notified the commissioners of Allen county of the meeting. The commissioners of Allen county failed, and refused to attend. The commissioners of Putnam county proceeded to ascertain the debt of Putnam county, and found that it amounted to over \$10,000; and, in accordance with the rule laid down in the statute, made a computation of what amount of this debt should be liquidated by Allen county. For the year 1849, Putnam county collected by tax \$860.29, and paid off that amount of the debt. This required of Allen county, according to the computation made as above to pay as her proportion to the county of Putnam, \$330. A demand was made on the auditor of Allen county to draw an order in favor of Putnam county for that amount; this he refused to do. On application to the su-

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preme court on the circuit, an alternative mandamus was granted to the auditor of Allen county.

The auditor answered, assigning various reasons why a peremptory mandamus should not issue. All these reasons have, by an agreement of counsel, been withdrawn, except one, which is that the law under which this claim arises is unconstitutional.

It has been substantially agreed that all the facts alleged by the plaintiff shall be taken as true. Is the law constitutional?

Under the constitution of 1802, in existence when these proceedings were had, it was always supposed that the legislature had power to erect new counties out of those already established, only limited by the provision that required all of the counties to be of a 325] certain extent of territory, and, as *a consequence of the exercise of this power, justice frequently required that an adjustment of the property and liabilities of the counties out of which the new county was formed, should be made. Counsel have not referred us to any provision of the constitution that has been violated by such action, and we are unable to discover any. It has been often said that this power of the legislature, in making new counties, has been much abused, and we think it likely that it has been; but this does not affect the constitutional right to exercise the power. We suppose that the legislature had the power to make new counties, and that, in the exercise of such power, they were frequently required to make provision for adapting the liability of the counties affected by such change to the new state of things.

It is said, however, that this law is unjust towards the old part of Allen county. Now, as between Allen and Putnam counties, if Allen received about one-third of Putnam county, Putnam would, in that proportion, be less able to pay her debts; and Allen, by the accession, would be more able to pay her own debts and expenses, and could without loss from the change pay a portion of the debt of Putnam county, and justice required that she should do it.

But whether she was required to pay more than her share, we have not the means of accurately ascertaining. Nor is it important in the present controversy; for if the legislature, in the exercise of a constitutional power, were mistaken in judgment, it would not render their act unconstitutional or void. We have no doubt that the law is constitutional and valid. This disposes of the main controversy between the parties.

A question, however, arises, Whether this court, under the cir-

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cumstances, can compel the auditor of Allen county, by mandamus, to issue the order for the amount claimed by Putnam county? The auditor of a county is a ministerial officer, except in such special cases as the legislature may clothe him with discretionary powers. The county commissioners are the general legal representatives of the county. *In this particular instance, the auditor had no authority in determining the amount that was to be paid by Allen county; he was merely to draw an order for such amount as should be determined on by the commissioners of the two counties. The amount to be paid has never been decided in the way provided for by the statute. On the refusal of the commissioners of Allen county to meet with those of Putnam county, and to fix the amount, a right of action accrued to Putnam county to recover from Allen such amount as might be found due, under the rule of computation laid down in the statute.

No provision is made for the commissioners of Putnam county alone fixing the amount. So that Allen county is not bound by the assessment thus made, although she is bound to pay so much as might be found due in an appropriate action. If the amount were fixed in the mode contemplated in the statute, or if it were liquidated by judgment, mandamus would be the proper remedy to compel the auditor to perform the ministerial act of drawing the order; but until the amount is thus liquidated, we think the auditor can not be compelled to act; the time for his action has not arrived. It is true that no objection is taken in this proceeding to the amount; it is admitted that the indebtedness of Putnam county is truly stated, and that the sum that Allen county was to pay, was assessed in the manner and at the time claimed by plaintiff; but it is not clearly admitted to be the true liability of Allen county; but even if it were, the auditor, having no right to fix the amount, could not, as we think, bind the county by any admission. The action of the auditor, in this matter being merely ministerial, we think that mandamus will not be against him for refusing to act until the amount is legally assessed. This principle is clearly recognized in the case of *Burnet v. The Auditor of Portage Co.*, 12 Ohio 57. The application of a peremptory mandamus will therefore be refused, and the writ dismissed.

Peremptory mandamus refused.

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The right of contribution among sureties is founded, not in the contract of suretyship, but is the result of a general equity which equalizes burdens and benefits; and the common law which has adopted and given effect to this equitable principle, by an action upon an implied assumpsit, only allows the action where there is a just and equitable ground for contribution.

Where a surety has voluntarily paid money on a void note or obligation, he can not maintain an action against his co-surety for contribution.

WRIT of error to reverse the judgment of the court of common pleas, reserved in the district court for the county of Warren.

The original action was assumpsit, instituted in the common pleas in November, 1850, for contribution on account of money paid by the plaintiff as co-surety with the defendant. Plea, *non assumpsit*. The intervention of a jury being waived and the cause submitted, the court found for the defendant. The plaintiff moved for a new trial, which motion was overruled and judgment rendered against the plaintiff. A bill of exceptions was taken to the ruling of the court, from which it appears:

That on the 1st day of February, 1849, William Russell, J. Van Harlington, John R. Russell, and Christian Failor executed their joint and several promissory note for one thousand dollars, payable ninety days after its date, to the Preble County Branch, in Eaton, of the State Bank of Ohio, at the Ohio Life Insurance and Trust Company, Cincinnati. On this note William Russell was the principal, and the other above-named makers were sureties. The note was discounted for William Russell, and the proceeds applied for his benefit. On the 19th of May, 1849, the note was protested for non-payment. Shortly after the discount of the note, William Russell failed; and on the 5th of March, 1849, John R. Russell, the plaintiff, executed a mortgage on certain real estate in Middletown, Butler county, Ohio, to the Preble Branch Bank, to secure the payment of this and also another *note; and on the 19th [328 of April, 1850, paid to said branch bank \$700, in full for the note above described, and at the same time satisfied the residue of the mortgage. And this suit was brought to recover Taylor's proportion of the \$700. Prior to the commencement of the suit the

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plaintiff called on the defendant, presented the note and protest, informed him of the payment, and demanded contribution, which the defendant refused to make. It appears, from the testimony of an agent of the branch bank, that, when the note was discounted, interest at the rate of six per cent. per annum was reserved or taken thereon by the branch bank in advance; and that, in addition to such interest, the further sum of three-fourths of one per cent. on the amount of said note was reserved on the alleged ground of a charge for exchange, and the trouble and expense of collecting and remitting the funds when collected from Cincinnati to Eaton. It further appears that, at the time of the discount of the note, the rate of exchange between Eaton and Cincinnati was in favor of the latter place; also, that the plaintiff had notice of the reservation by the branch bank of the three-fourths of one per cent. over and above the six per cent. interest before the payment of the note. It does not, however, appear by any direct proof that he had knowledge of this fact at the time of the execution of the mortgage aforesaid.

G. J. & J. M. Smith, for plaintiff.

Ward, for defendant.

BARTLEY, C.J. The errors assigned in this case are substantially the following:

1. That the court erred in holding that the note was void, and that the payment of the same by the plaintiff gave him no right of action against the defendant for contribution.

2. That the court erred in overruling the motion for a new trial, etc.

Two questions are here presented for determination:

1. Was the note void on the ground of usury?

329] 2. *Can a surety on a promissary note which is absolutely void by the voluntary payment thereof, entitle himself to contribution against the co-surety?

The first question has been determined in the affirmative by adjudications already made in this state. See the case of the Preble Branch of the State Bank of Ohio v. William Russell and others, ante, p. 313; also Chillicothe Bank v. Swayne, 8 Ohio, 257; Creed v. The Commercial Bank of Cincinnati, 11 Ohio, 489; The Miami Exporting Company v. Clark, 13 Ohio, 1; Commercial Bank v. Reed, 11 Ohio, 498; United States Bank v. Owens, 2 Pet. 538.

The second question is one which does not appear to have been very frequently presented for adjudication.

The right of contribution among sureties is founded not in the contract of suretyship, but is the result of a general principle of equity which equalizes burdens and benefits. The common law has adopted, and given effect to this equitable principle on which a surety is entitled to contribution from his co-surety. This equitable obligation to contribute having been established, the law raises an implied assumpsit on the part of the co-surety, to pay his share of the loss resulting from a concurrent liability to pay a common debt. This jurisdiction, by an action at law, is, therefore, resorted to, when the case is not complicated; and the more extensive and efficient aid of a court of equity is thus rendered unnecessary. It follows that this action can only be sustained where there exists a just and equitable ground for contribution.

A contract of suretyship is accessory to an obligation contracted by another person, either contemporaneously, or previously, or subsequently. It is of the essence of the contract, that there be a subsisting valid obligation of a principal debtor. Without a principal, there can be no accessory; and by the extinction of the former, the latter becomes extinct. This results from the nature of the obligation of suretyship. *Burge on Suretyship*, 3, 6; *Theobald on Prin. and Surety*, 2.

*It would seem to follow, from the very nature of the un- [330]dertaking, that if the principal contract is absolutely void, the obligation of the surety would likewise be void. But it is said, that where the contract of the principal debtor is only voidable on account of incapacity or otherwise, and the person undertaking as surety contracted with a knowledge of the incapacity or other cause making the principal obligation voidable, he must be understood as incurring not merely a collateral but a principal obligation. How far this may extend, as between surety and principal, it is not necessary here to inquire; but there seems to be sound reason in the doctrine, that where the surety has knowledge of that which amounts to a valid defense for him against the creditor, he is bound either to avail himself of it, or to give notice to the principal debtor, so as to enable him to set up the defense; and in default of doing either, he would be deprived of recourse against the principal. *Burge on Suretyship*, 367.

The utmost extent to which a surety, who has made payment

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can claim, is a subrogation to the rights of the creditor, so that he will rank against the debtor in the same degree as the creditor would have done if he had not been paid. Where, therefore, a surety could have no remedy against the principal, he clearly could have none against his co-surety, against whom he would have less equity in his favor.

Such, then, being the nature of the contract of suretyship, to what right of contribution was the plaintiff entitled in this case against the defendant? The claim set up by the branch bank was absolutely void; and it could have acquired no validity from the execution of the mortgage by the plaintiff before he had notice of the usury, especially as against the defendant. And it appears that the plaintiff had knowledge of the usury before he paid the debt. With what pretense of equity can the plaintiff, who was not bound himself by voluntarily paying a void note, claim to impose an obligation upon the defendant as his co-surety, who was under no obligation before, either legal or equitable? Had the creditor instituted a suit on 331] the note against the defendant, his *remedy was clear and complete; and he could not certainly have been deprived of his means of defense by the voluntary act of the plaintiff. This is clearly not a case where an implied assumpsit could have been raised against a co-surety for contribution.

The principle laid down in the case of *Skillin v. Merrill*, 16 Mass. 40, would seem to be in point in this case, and fatal to the plaintiff's cause of action. And it is not shaken by the case of *Ford v. Keith*, 1 Mass. 139, and the case decided upon its authority, of *Wallace v. Burns*, 6 Ala. 780, to which reference has been made. The last two cases are not strictly analogous to the present one. Upon no principle of justice or sound reason can a surety, by voluntarily paying money on a void note, impose an obligation upon a co-surety for contribution.

Judgment affirmed.

JOHN SHEPLER v. WILLIAM F. DEWEY.

The act of April 30, 1852, makes applicable to the courts under the present constitution the remedies provided by the act of March 21, 1845, "to regulate the practice of the judicial courts."

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The issuing of a writ of error, under the sixth section of the act of March 12, 1845, is not inconsistent with the legislation under the present constitution, and may be done as of course.

ERROR to the district court in Wood county.

Spink & Murray, for plaintiff in error.

Young and Waite, for defendant.

CORWIN, J. This is a writ of error to the district court of Wood county.

The question presented is one of practice, which has been differently decided by the district courts of the state, and this case is brought here that a uniform rule may be established.

*At the March term, 1852, of the court of common pleas of [332 Wood county, the defendant in error recovered a judgment against the plaintiff for the sum of one hundred and twelve dollars and fifty-six cents, and costs; upon which a writ of error was issued, upon the precipe of the plaintiff, on the 17th day of July, 1852, removing the cause to the district court; at the September term of which court, 1852, the judgment of the court of common pleas was affirmed, with the statutory penalty and costs; to reverse which judgment of affirmance this writ is prosecuted.

I shall not stop to remark upon the fact that this plaintiff is seeking to reverse the decision of the court whose aid he had invoked, simply upon the ground that it had not jurisdiction to try the question which he had himself submitted to that court; but come at once to the question, whether, under the laws of Ohio, in force on the 17th of July, 1852, and which are still in force, a writ of error may issue in civil causes from the district court to the court of common pleas, as a matter of course: or whether, in all cases, it must issue only upon allowance of the district court, or one of the judges of the supreme court in vacation.

The fourth section of the act of February 19, 1852, 50 Ohio L. 67, "relating to the organization of courts of justice, and their powers and duties," confers upon the supreme court, when in session, the power, "in addition to the original jurisdiction conferred by section 2, art. 4, of the constitution, on good cause shown, to issue writs of error, certiorari, supersedeas, ne exeat, and all other writs not specially provided for by statute, which may be necessary to enforce the due administration of right and justice throughout

the state;" and either of the judges of the supreme court, in vacation, is authorized on good cause shown to grant writs of error, supersedeas, and certiorari, and also writs of habeas corpus. By the 13th section of the same act, the same power is conferred upon the district court, as such, but not upon its judges in vacation, except that the writ of habeas corpus is not therein specially mentioned.

333] *The first section of the "act further prescribing the powers and duties of the courts of this state," etc., passed April 30, 1852, provides:

"That all process and remedies authorized by the laws of this state, when the present constitution took effect, may be had and restored to in the courts of the proper jurisdiction, under the present constitution; and all the laws regulating the practice of, and imposing duties upon, or granting powers to the supreme court, or any judge thereof, and the courts of common pleas, or any judge thereof, respectively, under the former constitution, except as to matters of probate jurisdiction, in force when the present constitution took effect, shall govern the practice of, and impose like duties upon the district courts and courts of common pleas and the judges thereof respectively created by the present constitution, so far as such process, remedies and laws shall be applicable to said court respectively, and to the judges thereof, and not inconsistent with the laws passed since the present constitution took effect." 50 Ohio L. 102.

The act of March 12, 1845, "to regulate the practice of the judicial courts," did "regulate the practice of the supreme court, under the former constitution," and "was in force when the present constitution took effect," and must "govern the practice of the district courts, created by the present constitution," so far as the same shall be applicable "and not inconsistent with the laws passed since the present constitution took effect."

The 6th section of the act of March 12, 1845, authorizes the issuing of a writ of error from the supreme court to the court of common pleas as a matter of course; and it is not contended that that act has been expressly repealed, or that its remedies are inapplicable to the present judicial organization. But it is claimed that the general grant of jurisdiction in the first section of the act of April 30, 1852, shall not be held to extend to remedies theretofore specially provided for; and that inasmuch as the act of Feb-

ruary 19, 1852, provides for the issuing of writs of error, upon *good cause shown, they can not be issued in any other manner. But from March 12, 1845, until the present courts were organized, under a precisely similar state of law, a different construction and different practice prevailed. The supreme court and the judges thereof, respectively, under the old constitution, had the same power, upon good cause shown, to allow writs of error; and the existence of this power was never held to be inconsistent with the right of a suitor, in a civil cause, to his writ of error, as allowed by the act of 1845. The power conferred by the act of February 19, 1852, is indispensable; for the rights conferred by the act of March 12, 1845, and continued by the act of April, 1852, extend only to civil causes; and, in the absence of authority to allow writs of error, upon good cause shown, no writ of error could be had in a criminal case. The supreme court, or the district court, when in session, and either of the judges of the supreme court, in vacation, have the undoubted power to allow a writ of error, upon good cause shown, in any case, criminal or civil; but this power does not abrogate the right of a suitor to a writ of error in any other mode which the law has provided or may provide.

But it is also claimed that this practice is "inconsistent with the laws passed since the present constitution took effect;" because the law "regulating appeals to the district court," provides heavier penalties for a vexatious appeal, than can by law be assessed in a proceeding in error, merely for delay. It is perfectly clear that a heavier penalty does attach in the one case than in the other; but the fact by no means creates such an absolute inconsistency as to effect an implied repeal of the law authorizing writs of error to issue as a matter of course. Repeals by implication are never favored, and never will be declared when the two laws may well stand together. And here, although the legislature have allowed appeals at law from the court of common pleas to the district court, yet it may have been the policy of the legislature, and I think it a wise policy, to encourage another simpler, less expensive, and more expeditious *method of reviewing the decisions of the court [335 of common pleas. By making the penalty less in a proceeding in error than in a general appeal of the whole case, appeals are discouraged; and my observation inclines me to the belief that the necessities of our political organization will compel the legislature to extend this policy still farther, if not entirely to repeal the law

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authorizing appeals upon questions of fact. But whatever modifications of the law our future experience may make necessary, it is sufficient for the present question to declare, as the majority of the court are clearly of the opinion, that the sixth section of the act of March 12, 1845, has never been expressly or impliedly repealed; that it is, by the act of April 30, 1852 (50 Ohio L. 102), made applicable to the courts organized under the present constitution; and that the remedy it affords is not inconsistent with any subsequent legislation.

The judgment of the district court is therefore affirmed.

BARTLEY, C. J. I can not concur in the opinion of the majority of the court in this case, and deem it proper to state briefly the grounds of my dissent.

The present supreme court is a different and an entirely distinct tribunal from the late supreme court in bank, under the old constitution, differing from it not in its organization merely, but also in its jurisdiction, both original and appellate. The 2d section of the 4th article of the constitution confers upon the present supreme court, "*original jurisdiction in quo warranto, mandamus, habeas corpus, and procedendo, and such appellate jurisdiction as may be provided by law.*" The district court is also a new and distinct organization, differing from the late supreme court on the circuit, not merely in the mode in which it is constituted, but likewise in its jurisdiction. The 6th section of the 4th article of the constitution provides, that "the district court shall have like original jurisdiction with the supreme court, and such appellate jurisdiction as may be provided by law."

The writ of error falls within the appellate jurisdiction, and therefore had to be conferred by a law to be enacted after the constitution took effect.

336] *It can not be maintained that the 12th section of the schedule in the constitution confers this jurisdiction by providing that, "the district courts shall, in their respective counties, be the successors of the present supreme court, and all suits, etc., pending in said supreme court in the several counties, shall be transferred to the respective district courts of such counties," etc. The provisions of the schedule were, in their very nature, intended for mere temporary or limited purposes; and by a fair interpretation of this particular provision, the district court became the successor

of the supreme court on the circuit, only with reference to the causes pending, judgments, records, etc. A different construction would lead to absurdity and contradiction. The whole context of an instrument must be looked to, in giving it an interpretation. If, by this provision in the schedule, the district courts succeeded to all the jurisdiction of the late supreme court on the circuit, it would be in conflict with the provision in the body of the constitution above mentioned, which fixed the original jurisdiction, confining it to four writs, and provided *prospectively* that the appellate jurisdiction should be prescribed by law.

It is true that the laws relating to the jurisdiction of the courts, and regulating the process and remedies in the courts under the old constitution, which were in force when the new constitution took effect, and not contrary to its provisions, continued in full force so long as those courts continued to exist. But when those courts ceased to exist, the laws, which were in their terms made applicable to them, lost their legal vitality for want of the judicial organization for which they were enacted and to which they were adapted.

The general assembly, in the enactment of February 19, 1852, relating to the organization of courts of justice and their powers and duties, sections 4 and 13, conferred the jurisdiction upon the new courts to issue writs of error, but expressly provided that they should be issued "*on good cause shown.*" And these provisions are not confined to writs of error in any particular class of cases, but in terms apply to the issue of writs of error in all cases. So [337 that the law contemplated by the new constitution, relating to the new courts, instead of authorizing writs of error as of course, expressly provided an allowance "*on good cause shown.*" And by no correct principle of construction can it be maintained that this general authority for the issue of writs of error on an allowance is qualified and enlarged by the 18th section of the law, which provided that "All process and remedies authorized by the laws of this state, etc., when the present constitution took effect, may be had and resorted to, in the courts of the proper jurisdiction under the present constitution," etc. A statute is to be construed with reference to the whole context of it, and the intention of the law-making power. If, under the provision in this 18th section, writs of error could have been issued, the authority would be qualified by the condition of an allowance "*on good cause shown,*" prescribed in the preceding part of the same act. A different construction would lead to a repugnancy,

at war with the evident intention of the legislature. A provision, in one part of the statute, conferring general authority to issue all writs of error, whether returnable to the supreme court, or to the district court, upon an allowance on good cause shown, would be in plain conflict with a provision in another part of the same statute authorizing all writs of error from districts courts, upon judgments at law in the courts of common pleas, to issue as a matter of course, whether there existed good cause or not.

The general assembly, however, in the amendatory act of 30th April, 1852, repealed this 18th section, and at the same time re-enacted the same provision, with some little change in other respects, adding a clause "*excepting all process, remedies and laws inconsistent with the laws passed since the present constitution took effect.*" This exception, as it seems to me, removed all ground for controversy, and clearly left the general provision in the act of 19th February, authorizing writs of errors only on an allowance on good cause unqualified in every respect.

338] *The following, from Smith's Commentaries on statutory construction, sec. 490, is in point :

"In the interpretation and construction of a law, every part and the whole law is to be considered, and the sense gathered from the whole and each expression, and not so much the signification, which a particular word individually would admit of, as that which it ought to have from the context, spirit and purview of the law. It was a maxim of the Roman law : '*Incivile est, nisi tota lege perspecta una aliqua particula ejus proposita judiciari vel respondere.*' It is only in this way an interpretation can be made in such a manner as that all parts shall be made consonant with each other, so that what follows may agree with what precedes. This should always be done by interpretation, unless it evidently appears, that, by subsequent clauses, the framers intended to make some alteration in preceding ones. So, too, two different statutes, enacted at different times, may have such a relation to each other, and stand so intimately connected as that the one may serve as a key to the true interpretation of the other ; and upon this principle rests the doctrine of examining all the statutes *in pari materia.*"

And the author adds : "The reason of the statute—that is, the motives which led to the making of it, the object in contemplation, at the time the act was passed, is another criterion by which to ascertain the true meaning of the act."

The power to issue writs of error, conferred by the act for the organization of the courts under the former constitution, authorized it only upon an allowance on "*good cause shown*." And this regulation continued until the statute of March 12, 1845, prohibiting appeals to the supreme court. In this enactment the legislature substituted the writ of error as a matter of course for appeals which were prohibited. And in the statute of 19th February, 1852, above mentioned, the legislature provided for the restoration of the right of appeal from the judgment of the court of common pleas, and, at the same time expressly authorized writs of error generally, but only upon "*good cause shown*." The object and intention of the law-making power appear to me to be too apparent to admit of controversy.

There is yet another difficulty in finding authority for issuing writs of error as a matter of course, under the authority of the sweeping provision that "all process and remedies authorized by the laws of this state, and the laws regulating the practice of courts, etc., when the present constitution took effect, shall be applicable to the courts under the present constitution." This provision of the statute, if it has any *validity, both revives and amends [339 sundry laws, and parts of laws, covering several hundred pages on the statute books, and relating to a variety of different subjects connected with the powers, duties, and practice of the several courts. The 16th section of the 2d article of the constitution contains a restriction upon the power of the general assembly, in the enactment of laws, to wit:

"No bill shall contain more than one subject, which shall be clearly expressed in its title; and no law shall be revived or amended, unless the new act contain the entire act revived, or the section or sections amended; and the section or sections so amended shall be repealed."

When the courts, under the former constitution, ceased to exist, the laws regulating their powers and duties, and made *especially* applicable to them, lost their validity and became a dead letter upon the statute book. The object upon which they operated having become extinct, they became wholly inoperative. If new life was given to these laws by making them applicable to another and different judicial organization, they were revived *without the new act containing the entire act or acts revived*.

An amendatory law is one which makes additional provisions to,

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or some change in the original act. If these statutes were so changed as to acquire a new operation which did not before belong to them, they were amended without a compliance with the constitution.

One of the chief objects of the new constitution was to impose some restraint upon hasty and inconsiderate legislation and the abuse of legislative power. So frequent and so inconsiderate have been the changes made in the laws of the state, that it has become a serious question whether the evils of legislation do not preponderate over its blessings. The framers of the new constitution have endeavored to impose some salutary checks upon this abuse of power. If these constitutional restraints are to be disregarded or frittered away by construction, the legislative branch of the government may lose the confidence of its most zealous advocates, as a safe depository of civil power.

340] *It is said that a compliance with this provision of the constitution would, in this instance, have occasioned great and unnecessary inconvenience. I have yet to learn that the *argumentum ab inconvenienti* ought to prevail against the strict observance of the constitutional regulations or restraints upon legislative power.

THURMAN, J. I fully concur with the majority of the court in regarding as constitutional the eighteenth section of the act for the organization of the courts (50 Ohio L. 71), and the act of April 30, 1852, *idem* 102, by which it was repealed and re-enacted with amendments. It is objected to these statutes that they are attempts to revive and amend the practice acts that were applicable only to the courts under the old constitution, and that, therefore, they conflict with art. 2, sec. 16 of the new constitution, which provides that "no law shall be revived or amended, unless the new act contain the entire act revived, or the section or sections amended; and the section or sections so amended shall be repealed."

As I have said, in *Hubble v. Renick*, ante, 176, I am strongly inclined to the opinion that the practice acts and various others providing remedies and regulating judicial proceedings, in force when the present constitution took effect, are saved by it, and would, without the statutes in question, govern the existing courts in the exercise of their proper jurisdiction. It is true, the present courts are creations of the new constitution, and are, therefore, by whatever names called, distinct from the former courts. Laws,

then, relating to the old courts would seem to have no application to the new, unless made to apply by the constitution or by legislation. Of course, some of the laws relative to the judiciary expired with the old system, being in their nature wholly inapplicable to the new courts. But the great body of the statutes, which might be applied to the present courts without contravening the constitution, was so applied, as I think, by that instrument itself; not in express words, but by necessary implication. The constitution took effect September 1, 1851; but, under its provisions, the old judiciary remained in power until the second Monday of February, 1852. Up to this time, therefore, the practice acts, etc., were clearly in force. Many suits and matters, however, were then pending and undisposed of. This had been foreseen, and provisions in the constitution directed them to be transferred to the new courts and proceeded in to final judgment. How could this be done if the laws under which they originated, and pursuant to which they had been conducted up to February 9, 1852, then expired, and the legislature had no power to pass the eighteenth section aforesaid? It was surely never contemplated that a new statute book would be made between the first Monday of January, when the legislature was to meet, and the second Monday of February, when the new courts would come into power. Nor could it have been intended that parties to such litigation should be compelled to await legislation. Was it designed, for instance, that a plaintiff in attachment, whose suit was brought before February 9, should be unable to proceed a single step until a new attachment law should be enacted, and that no new writ should be issued before the passage of such an act? And that all proceedings under the water-craft law, and in dower, partition, replevin, and the other statutory remedies, should be suspended, and no other suits brought until the general assembly should enact laws in detail upon these subjects? Were the probate of wills, the granting of letters testamentary and of administration, the appointment of guardians, inquisitions of lunacy, and condemnations of property for the public use, all to await legislation? Was no justice of the peace, elected under the new constitution, to have any power until an act defining his jurisdiction, and prescribing the mode of its exercise should be passed? I see nothing in either the tenor or spirit of the instrument that requires such a decision. On the contrary, both seem to me to be opposed to it. In respect to suits pending in the court in bank, it is provided that

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342] they shall be transferred to the *new supreme court, "and be proceeded in according to law." It is not said, according to such laws as may hereafter be enacted; but simply "according to law"—that is according to the law for the time being, no matter when enacted. Schedule, sec. 11.

As to the causes to be transferred from the supreme court to the district courts, it is expressly provided that they shall "be proceeded in as though no change had been made in said supreme court." Schedule, sec. 12.

Had no such change been made, it will not be denied that the statutes in question, enacted under the former constitution, would have governed the practice of the court and the rights of the parties. They would have applied to the court by its very name. If so, they, in like manner, govern the districts courts, though newly created and bearing a different name. In regard to the cases transferred from the old to the new courts of common pleas, it is provided that they shall be proceeded in as though they had been instituted in the latter courts. Schedule, sec. 13. This imports that if they had been so instituted, the proceedings would have been the same that had already taken place; or, in other words, that the law of the two courts is the same, and is to so continue until the legislature otherwise provide. The probate courts are to proceed in the business transferred to them "according to law." Schedule, sec. 14. I have already remarked upon the meaning of this expression. No provision is made for a transfer of business to justices of the peace; because the old justices are to continue in office until their terms expire, respectively (Schedule, sec. 7), and the law provides what may be done when a justice goes out of office leaving unfinished business. The omission was evidently designed and tends strongly to show the understanding of the framers of the constitution, that the then existing laws would continue in force and govern the new courts so far as might be consistent with that instrument.

But it may be said that, although this may be the case so far as 343] respects suits, or other business, transferred from the *former courts, yet those laws are defunct for every other purpose; and that, therefore, no new suits can be brought under, or be regulated by them. Where, I would ask, is the necessity for any such limited construction? The objection to applying them to the present courts is, that the only courts named in them have ceased to exist.

But if this objection is valid at all, it extends to all cases, as well those transferred from the old courts as those originating in the new. And if it will not prevail as to the former, why should it as to the latter? If those laws govern the existing courts, though not named in them, when acting upon one class of cases, why will they not do so in all cases? So far as they have been repealed by the legislature, without a saving clause, they may have no force in any case; but so far as they remain, why shall they not govern new, as well as old suits? Is it reasonable to suppose that the constitution is so defective as to preclude all statutory remedies until the enactment of new statutes; that it was designed that no statutory action should be brought, or will be proved, or letters testamentary granted, or administrator or guardian appointed, or inquisition of lunacy had, or property condemned for public use, or recognizance taken, or indictment found, until the legislature should pass laws upon these subjects? In short, were the framers of the constitution in drafting, and the people in adopting it, so blind as to wipe out much the greater part of the statute book, when every dictate of reason prohibited their doing so? I think not. It is not done expressly, or by implication, nor do I discover any *casus omissus*.

I have purposely avoided mooted a question of no small difficulty, namely, whether the constitution does not effect something more than to transfer to the district court the unfinished business of the old supreme court in the counties, and to the new courts of common pleas, and the probate courts, the undisposed of cases of the former common pleas. Possibly, when the question arises, it will be found that there is a transfer of jurisdiction, not limited to the cases transferred; and that these new courts, until otherwise provided by law, took the entire jurisdiction of the old courts, so far as [344 such jurisdiction would not conflict with the provisions of art. 4th of the constitution. It may be that both the language of the schedule and reason require the construction; and if so, there can be no doubt that the old statutes in question remain in force, so far as they have not been altered or repealed by the legislature. But it is unnecessary now to decide this question. It is, undeniably, a very doubtful one, and ought not to be decided without full argument. Let it be granted, for present purposes, that no such extended jurisdiction is conferred by the constitution, and the case before us is not affected by the admission. For the courts now

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possess jurisdictions, in virtue of the constitution and the laws enacted under it, in the exercise of which they should be governed by former laws, to the extent I have endeavored to indicate. If the views I have expressed are correct, this necessarily results, whatever part of their jurisdiction is derived directly from the constitution, and whatever portion is conferred by the law.

It seems to me, therefore, that the eighteenth section of the act organizing the courts, and the first section of the act of April 30, 1852, are unnecessary; that the object intended by them is accomplished by the constitution itself, and that they were probably enacted merely out of abundant caution.

Be this, however, as it may, I am satisfied of their constitutionality. The clause of the constitution quoted against them provides that "no law shall be revived or amended, unless the new act contain the entire act revived, or the section or sections amended; and the section or sections, so amended, shall be repealed."

But, first, they revive no law; for none of the laws to which they refer had either been repealed or become obsolete. I think it can not be gainsaid that the old laws remain in force at least so far as the cases transferred from the old courts are concerned, except where they have been altered or repealed by the legislature. I am not aware that any body denies this. I think, as I have stated, 345] that, subject to this *exception, they are in force for all purposes; but if I am wrong, and they apply only to the transferred cases, that is sufficient to show that they are yet in force. And if they are in force for any purpose, or to any extent, they have not been repealed nor are they obsolete. It follows that the constitutional provision in regard to reviving laws has no application. It is said, however, that the eighteenth section and act of April 30, aforesaid, are attempts to amend them, by subjecting the present courts to their provisions; whereas, in their original state, they related to the old courts alone. But, technically speaking, they are not amended. We would not say that the common law is altered by the creation of a court of common law jurisdiction. We would not call it an amendment of the act organizing the courts, if a new court should be erected in a county with the same powers as the common pleas. These are not what, in legislative parlance, are called amendments, nor do I think them within the meaning of the above clause in the constitution. That clause does not refer, I imagine, to an act defining the general jurisdiction of a court.

If it does, and if the old laws were not saved by the constitution itself, it follows, as I have before said, that more than half the statute book was wiped out: and the duty of re-creating it in five weeks, imposed upon the legislature. No such impossibility could have been intended. And it also follows that if the general assembly create a new court, it must enact in detail all the laws that prescribe its jurisdiction and mode of procedure. If it is to be governed by the code, the code must be repealed and re-enacted with amendments to include the new court. If it is to have jurisdiction under the water-craft law, and in attachment, replevin, dower, partition, and the like, the various statutes on these subjects must, in like manner, be repealed and amended. Surely, no such thing as this could have been designed. And the language of the clause is not so stringent as to require it.

But while I agree with the majority of the court upon this point, and am not aware that in anything I have thus far said, *I [346 differ from them, I am yet unable to concur in their decision. For, in my judgment, it is inconsistent with the legislation of the present general assembly to hold that a writ of error is, in any case, a writ of course. I think that, in every case, it must be allowed; otherwise it can not be issued.

By the third section of the act of 1831 (Swan's Stat. 222), power was given to the supreme court to issue writs of error "on good cause shown." It was in virtue of the power thus given that all such writs, whether in civil or criminal cases, were issued by that court; and, as good cause was required to be shown, it was obviously necessary, and was so uniformly held, that there must be an allowance. But, in 1845, the right, theretofore existing, to appeal an action at law to the supreme court, and thereby have a second trial of an issue of fact, was taken away; and, in lieu of it, the writ of error in civil causes was made a matter of course. (43 Ohio L. 80.) So stood the law when the present constitution took effect, and if, under its provisions contained in the schedule, the district courts took the same jurisdiction, until otherwise provided by law, that the old supreme court in the counties had possessed, so far as such jurisdiction was consistent with the fourth article of the constitution, it follows that a writ of error is yet a thing of course, unless subsequent legislation has taken away the right and required it to be allowed. I think it demonstrable that it has been so taken away, if it ever existed under the present constitution, not by the

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express words of any act, but by necessary implication. If, on the other hand, the district courts had no appellate jurisdiction until it was conferred upon them by law, it results that, as a writ of error is a mode of appeal, it can only be issued pursuant to some statute of the present general assembly; and if no such statute makes it a matter of course, it must be allowed. This is not denied, and therefore the act of April 30, 1852, is relied upon, as giving the writ without an allowance. The first section of that act provides: "That all process and remedies authorized by the laws of this state, when the present constitution took effect, may be had and resorted to in the courts of the proper jurisdiction under the present constitution; and all the laws *regulating the practice of, [347 and imposing duties on or granting powers to the supreme court, or any judge thereof, and the courts of common pleas, or any judge thereof, respectively, under the former constitution, except as to matters of probate jurisdiction, in force when the present constitution took effect, shall govern the practice of and impose like duties upon the districts courts and courts of common pleas, and the judges thereof, respectively, created by the present constitution, so far as such process, remedies, and laws shall be applicable to said courts respectively, and to the judges thereof, *and not inconsistent with the laws passed since the present constitution took effect.*"

It is evident that this statute is amply sufficient to authorize a writ of error in a civil cause, as a matter of course, unless its being so issued is inconsistent with some law or laws previously enacted under the present constitution. If there is such inconsistency, then, by the express words of the statute, the remedy is withheld. I maintain that it is inconsistent, first, with the act for the organization of the courts, passed February 19, 1852, and, secondly, with the acts regulating appeals to the district courts, passed March 23, 1852. By the 13th section of the former act, the general appellate jurisdiction of the district courts is conferred; and among the powers given is the "power, on good cause shown, to issue writs of error." If this is the only grant of power to issue the writ, it is conceded that it requires an allowance, for the language is the same as that of the act of 1831, under which an allowance was always deemed necessary. But the eighteenth section of the act is very similar to the section above quoted from the act of April 30. The only differences are, first, that the latter section supplies certain supposed deficiencies of the former, by granting to single judges certain

powers, that were thought not to have been conferred by the former; and, secondly, it expressly limits the powers and remedies granted, by providing that they must not be inconsistent with previous legislation under the present constitution. As, then, the eighteenth section, if it stood alone, would give a writ of error in a civil case, without an allowance, it is contended that the power to issue [348 writs, upon good cause shown, conferred by the thirteenth section, was meant for criminal cases only. I can not think so. The thirteenth section was designed, it seems to me, to provide appellate jurisdiction, and the eighteenth section, to regulate its exercise. I do not say that this is all that the latter effected, but it appears to me to have been its main object; and I would therefore construe it as limited by the thirteenth, where they conflict. It is a well settled rule of construction, that general words in a statute will be restricted where special provisions in the same act seem to require it. Jurisdiction in *all* cases in error was meant to be conferred by the thirteenth section; and its language should, therefore, govern and limit the general terms of the eighteenth. If so, every writ of error required an allowance under the act organizing the courts.

Let us now turn to the acts regulating appeals. If a party would appeal under it, he must, at the judgment term, enter notice of his intention upon the record of the court; and, within thirty days from the term, give bond with one or more sufficient sureties. The penalty of the bond must be double the amount of the judgment where that is for the payment of money only; but may be in a much greater sum if the judgment is for nominal damages and costs, or for costs only; for, in the latter cases, the court fixes the penalty. If the judgment was for the payment of money only, and the appellate court render substantially the same judgment, and is satisfied that the appeal was vexatious, and for the purpose of delay merely, a penalty of ten per cent. upon the amount of the judgment below shall be adjudged against the appellant; but if the judgment below was for nominal damages and costs, or for costs only, and substantially the same judgment is rendered in the appellate court and the court shall not be satisfied that there was reasonable and probable ground for the appeal, "there shall be adjudged to the appellee, or party affected by the appeal, damages in such specific sum as may be deemed reasonable, not exceeding two hundred dollars."

*Such are the provisions of the statute, wisely designed to [349 guard the rights of the parties, to discourage useless litigation, and

to protect creditors and courts against frivolous and vexatious appeals.

But these are plainly idle provisions, in a multitude of cases, if a party can have a writ of error as a matter of course. No man, seeking delay merely, will put himself to the trouble of entering notice of appeal and giving bond within thirty days, if, at any time within five years, when menaced with an execution, he can supersede it by a writ of error, issued upon his own *ipse dixit*. No such man, against whom nominal damages and costs, or costs only, have been adjudged, will give a bond in a penalty fixed by the court, when a writ of error bond in double the amount of the judgment may suffice; nor will he run the risk of paying two hundred dollars damages upon a vexatious appeal, when but five per cent. penalty can be awarded upon a writ of error. Nor will any judgment debtor, merely seeking delay, appeal his cause and pay ten per cent. damages when he can take it up on error and pay but five. Now, ought we to believe that, after providing so carefully, by their act of March 23, against frivolous appeals and vexatious litigation, the legislature turned about on April 30th, and substantially undid all their work? And this, too, when no possible reason for undoing it could have existed? It has never been our policy to allow an appeal and a writ of error of course. It was only when the former was taken away in 1845 that the latter was given. The former has been restored, and there was no longer any necessity for the latter. I can not think that the legislature meant to give both, and I find nothing in the statute relied on that requires us to defeat their intent. On the contrary, believing that the writ, unless allowed, is inconsistent with the terms of the act organizing the courts, and manifestly derogatory to the spirit and intent of the act regulating appeals, I hold it to be clearly negatived by the act of April 30. I must, therefore, with great respect for the better judgment of the majority of the court, dissent from their decision.

Judgment of district court affirmed.

***ELIZA A. JOHNS v. ROBERTA JOHNS AND OTHERS. [350**

Shares in railroad companies are personal property, whether the companies are, or are not, subject to the provisions of the "act regulating railroad companies," passed February 11, 1848.

THIS is a petition, in which the plaintiff, the widow of Benjamin Johns, deceased, claims dower in 46 shares of the capital stock of "The Mansfield & Sandusky City Railroad Company," and in 10 shares of the capital stock of "The Ohio and Pennsylvania Railroad Company," of which shares her deceased husband, the said Benjamin Johns, was the owner at the time of his death.

The defendant Sherman, as executor as aforesaid, answers, admitting the facts alleged in the petition, but insisting that said shares are personal and not real estate. The defendant Roberta has not answered.

Isaac J. Allen, for petitioner.

C. T. Sherman, for defendants. .

THURMAN, J. The Ohio and Pennsylvania Railroad Company was incorporated February 24, 1848. 46 Ohio L. L. 261. The 5th section of its charter provides that the company "shall have all the powers and privileges, and be subject to all the restrictions and provisions of the "act regulating railroad companies," passed February 11, 1848. 46 Ohio L. 40. The third section of this latter act declares that the shares of stock in the companies that may be subject to its provisions, "shall be regarded as personal property, and shall be subject to execution at law." It is therefore manifest that the petitioner is not entitled to dower in the 10 shares of the stock of The Ohio & Pennsylvania Railroad Company, for they are clearly personalty. But the question in respect to the stock in The Mansfield & Sandusky City Railroad Company is not so easily disposed of. For that company is not, so far as the case shows, subject to the provisions of said act of February 11, 1848. It was previously chartered and organized, and that act does not interfere with [351] companies created before its passage. Turning then to the charter of the company, we find in it no provision declaring whether its stock is realty or personalty. We are thus brought to the general question, whether railroad shares in Ohio are, in the absence of

express legislative enactment, to be considered as real or personal estate. This question must be determined by a reference to the principles of the common law and the general statutes of the state that have a bearing upon it. And its solution is not without difficulty; for, as to the common law, the adjudicated cases are directly conflicting, and when we resort to our statutes the chief aid we derive is from analogies and inferences.

In *Drybutter v. Bartholomew*, decided in 1723, 2 P. Wms. 127, the master of the rolls said that "a fine may be, and usually is, levied of New River shares by the description of so much land covered with water," but the case does not inform us what these shares were, nor how they were created; and whether they were real or personal estate was not discussed. They appear to have had their origin in the statutes of 3 James 1, chap. 18, and 4 James 1, chap. 12, to enable the mayor, commonalty, and citizens of London to supply the city with water; but these acts simply authorized the construction of the works and the acquisition of the necessary right of way. They created no stock, nor is any mention made in them of shares or shareholders. Yet it would seem, from the case cited as well as the case of *Townshend v. Ash*, decided in 1745, 3 Atk. 336, that shares were created, and hence these cases have been frequently cited as showing that stock in a water works company is real estate.

By a statute of 10 Anne, the mayor, aldermen, and common council of the city of Bath, their successors or assigns, or such persons as they should appoint, were authorized to improve the navigation of the river Avon, and to charge tolls on persons and property transported thereon. By an agreement executed between the corporate authorities of the one part, and the Duke of Beaufort 352] and several other *persons on the other part, the duke and his associates undertook to do the work in consideration of being allowed to take the tolls. By the 11th article of the agreement it was provided that "no survivorship shall at any time take place between the said parties and undertakers; but if any or either of them shall happen to die, the share or part of such so dying shall descend and go to the *heirs* and assigns of the party or parties so dying."

In *Buckeridge v. Ingram*, decided in 1795, 2 Ves. Jr. 651, the question was directly made, whether these shares were personal or real estate, and it was decided that they were real estate and subject to dower. The master of the rolls held that the right to

take the tolls was an incorporeal hereditament arising out of realty, and was therefore a "tenement."

And he remarked: "I have no difficulty in saying that wherever a perpetual inheritance is granted, which arises out of lands, or is in any way connected with, or, as it is emphatically expressed by Lord Coke, exercisable within it, it is that sort of property the law denominates real."

The principle of these cases was followed, and possibly extended, by the supreme court of Connecticut, in 1818, in the case of *Welles v. Cowles*, 2 Conn. 567, in which it was held that shares of an *incorporated* turnpike company are real estate. The right to the tolls, said the court, "is a right issuing out of real property, annexed to and exercisable within it; and comes within the description of an incorporeal hereditament of a real nature, on the same principle as a share in the *New River*, in canal navigations and tolls of fairs and markets;" citing *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Habergham v. Vincent*, 2 Ves., 232, and *The King v. The Inhabitants of Chipping Norton*, 5 East, 239.

And in answer to the argument that the individual stockholders had only a claim on the company, and not upon the realty, and that this must be of a personal nature, the court said: "But the stockholders, as members of the company, are owners of the turnpike road; and it is in virtue of this interest that they have their claims for the dividends or their *respective shares of the toll. It is [353 not a mere claim on the corporation."

This decision was recognized as law in 1822, in a suit between the same parties, 4 Conn. 182, though the question was not expressly made.

In 1835 the supreme court of Pennsylvania held that "a toll bridge erected by two individuals across a river between their lands, by legislative authority is real estate." The court said that the right was "not only a right arising out of the soil, but, so far as the abutments of the bridge are concerned, it is the soil itself." *Hurst v. Meason*, 4 Watts, 346. It is to be observed, however, that it does not appear that the builders were incorporated.

In *Price v. Price's Heirs*, 6 Dana 107, the court of appeals of Kentucky, in 1838, held that the stock in the Lexington and Ohio Railroad Company is real estate. Without citing any adjudicated case, the court came to a conclusion which is thus expressed: "The right conferred on each shareholder is unquestionably an incorpo-

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real hereditament. It is a right of perpetual duration, and though it springs out of the use of personalty, as well as lands and houses, this matters not. It is a franchise which has ever been classed in that class of real estate denominated an incorporeal hereditament."

On the other hand, the supreme court of Massachusetts, in 1798, in *Russell et al. v. Temple et al.* 3 Dana's Abr. 108, held that shares in incorporated bridge and canal companies are personalty. The case was between the widow and heirs of Thomas Russell, the former contending that the shares were personal property, and that consequently she was entitled to a distributive portion of them, and the latter insisting that they were realty, and that, therefore, she had but a dower estate. The question was very fully discussed, and was decided (says Professor Greenleaf in his edition of Cruise), "upon great consideration."

"For the heirs it was urged that these shares were real estate; because, it was said, the estates were real in the corporations; and 354] that if the estates in the corporations were *real, the estates of the individual members in them followed their nature, and were real; and that the frequent declarations of the legislature declaring such shares personal estate, at least show a doubt that when one has a right to receive rent, he has only a right to receive a sum of money, yet it does not follow that his estate is not real estate out of which his rent issues."

For the widow it was argued that the shares were personalty, because the estate [in the bridges, canals, towing-paths, wharves and lands], "can only exist in the corporation which alone can acquire it, alone be seized or possessed of it, alone pass it away, manage, or repair it, and so must hold it entire; and that the corporation is a moral person to all the purposes of property. Its tenure is to their successors, or to their successors and assigns. The estates can never vest in or be divided among the individual members, to hold as tenants in common, etc., in their private capacities. Only the corporation can possess the estate, and that only by possessing the charter; and only the corporation can be taxed for it on common law principles; and on these can it alone be taken in execution for the debts of the corporation."

"That the share is personal estate though the corporation hold real estate; for the individual member has no estate, but only a right to such dividends as the corporation from time to time assigns to him. He is unknown in the grants made to it, and he can not

grant any part of the estate: nor can he be taxed for it but by statute law; nor can any private member of a corporation be distrained for a public concern of it; his only remedy for his dividend, is case in assumpsit, or an action on the case for a wrongful refusal, or neglect to pay, or allow him his part of the profits."

The judgment of the court was, as I have stated, that the shares were personal estate. "The principal reason of the decision," says Dana, "appears to be, because the court considered that the individual member or shareholder had only a right of action for a sum of money, his part of the net profits or dividends. And so the law has been held to be since this decision was made."

*In his edition of Cruise, Greenleaf says: "Shares in the [355 property of a corporation are real or personal property, according to the nature, object and manner of the investment. Where the corporate powers are to be exercised solely in land, as where original authority is given by the charter to remove obstructions in a river and render it navigable, to open new channels, etc., to make a canal, erect water-works, and the like, as was the case of the New River water, the navigation of the river Avon and some others and the property or interest in the land, though it be an incorporeal hereditament, is vested *inalienably in the corporators themselves*, the shares are deemed real estate. Such, in some of the United States, has been considered the nature of shares in toll bridge, canal and turnpike corporations by the common law; though latterly it has been thought that railway shares were more properly to be regarded as personal estate. But where the property originally entrusted is money, to be made profitable to the contributors by applying it to certain purposes, in the course of which it may be invested in lands or in personal property, and changed at pleasure, the capital fund is vested in the corporation, and the shares in the stock are deemed personal property, and as such are in all respects treated. In modern practice, however, shares in corporate stock, of whatever nature, are usually declared by statute to be personal estate." 1 Greenleaf's Cr. Dig. 39, 40.

In support of this statement, Mr. Greenleaf cites the cases we have already noticed, and some others that require consideration. One of the most important of these is *Bligh v. Bren*, 2 Y. & C. Exch. 268, 294. It involved the question whether the shares in the Chelsea Water-works company were realty or personalty. The act of incorporation left the question open, as it contained no de-

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claration upon the subject. The court reviewed the cases bearing upon it, and came to the conclusion that the shares were personalty. This decision was afterward, in 1838, spoken of with approbation in *Bradley v. Holdsworth*, 3 M. & W. 422.

356] *In the latter case the question was whether shares in the "London and Birmingham Railway" might be sold by a verbal contract. On the part of the defendant it was contended that they constituted an interest in land within the meaning of the statute of frauds, and that, therefore, a contract for their sale was void unless reduced to writing. The court held the contract valid. True, the act of incorporation declared that the shares should, to all intents and purposes, be deemed personal estate and transmissible as such, and should not be of the same nature of real property; but it is evident from what was said, that, independent of this provision, the same decision would have been made. Parke, B., said: "No doubt the company are seized of real property, as well as possessed of a great deal of personal property; but the interest of each individual shareholder is a *share of the net produce of both, when brought into one fund.*" And again: "I have no doubt whatever that the shares of the proprietors, as individuals, are personalty; they consist of nothing more than a *right to have a share of the net produce of all the property of the company.*"

Alderson, B., said: "All the cases were under review in *Bligh v. Brent*, where the question was as to the shares in the Chelsea Water-works company. That was a stronger case than the present, because there was no clause of this kind in the act of parliament, and yet the shares were held personal property." "I conceive that all the shareholders would take even without such a clause."

Bolland, B., concurred.

So in *Duncuft v. Albrecht*, 12 Sim. & S. 189, it was held that a parol agreement for the sale of railway shares is valid, for they are neither an interest in lands, nor goods, wares or merchandise, within the statute of frauds.

A careful examination of the adjudications upon the subject has brought us to the conclusion that, according to the weight of authority, the shares in question are personal property. In the early English cases the distinction, now well understood, between the 357] property of a corporation and *the rights of its members, does not seem to have been taken, and it appears to have been assumed that each shareholder had an *estate* in the corporate prop-

erty, and that, consequently, if that property was real, his share was also realty. But the cases we have cited abundantly show that the distinction above mentioned is now fully recognized in England, and that the property of a corporation may be mainly, if not wholly real, and yet the shares of its members be personalty. This may possibly be an innovation upon the ancient principles of the common law, but it is not more so than has taken place in the case of ordinary partnerships. Thus the old doctrine seems to have been that there could no partnership, properly so called, in land, but the contrary doctrine is now universally held; and that a widow of a deceased partner is not dowerable in lands which the firm owned and regarded as partnership stock, is settled by numerous decisions, among which are the cases in 1 Ohio, 535, and 8 Ohio, 328. As to the Connecticut case, *Welles v. Cowles*, there is possibly no necessary conflict between it and the view we take of the present case. There the right to tolls may be said to have arisen wholly out of realty, the turnpike road; but in the case at bar, the profits of the company accrue from real and personal property, and personal services. The turnpike company did not carry either goods or persons. It furnished no vehicles for the transportation of either, and had no care of or responsibility for either. It merely allowed a transit over its road upon the payment of a toll. But a railway company is a common carrier. It furnishes not simply a road, but also the conveyances that pass over it; it undertakes the transportation of passengers and freight, and incurs the responsibility of a common carrier as to both.

It was therefore justly said by Parke, B., in the quotation before given, that the interest of each individual shareholder is a share of the net produce of both real and personal property, (and he might have added, of personal services,) when brought into one fund. But we would not be understood as approving the [358 decision in *Welles v. Cowles*, for we are of opinion that shares in an incorporated turnpike company, as well as in a railway corporation, are personal property. The same distinction we have drawn between a turnpike and railroad company, may be drawn between the latter and the *Avon navigation case*, and the cases of tolls upon fairs and markets, and rents issuing out of realty. And this distinction seems to be taken by *Greenleaf*, in the quotation herebefore made. As to the case in 4 *Watts*, it is enough to say that it does not appear that the bridge builders were a corporation, or

that they intended to convert the bridge and right of taking tolls into a stock. The decision in 6 Dana, 107, is certainly directly opposed to our views. The court in that case seems to have wholly overlooked the distinction between the right of the company and the right of the shareholder, and to have concluded that if the company's franchise of taking toll was an incorporeal hereditament, springing even in part from the realty, the shareholder's interest could not be personalty. Indeed, the court call the shareholder's right a franchise. Now, I imagine that it is the artificial being, the corporation, and not the individual shareholder, that has the franchise, and possibly it is not immaterial whether the toll arises wholly out of realty, or partly out of realty and partly out of personalty. "An annuity," say the court, "though only chargeable upon the person of the grantor, is an incorporeal hereditament, and though the owner's security is merely personal, yet he may have a real estate in it," citing 2 Bl. Com. 40. True, such an annuity is realty so far as *descent* is concerned, or, more properly speaking, though personal in itself, it descends as if it were realty, the reason of which is that it is *limited by the grant to the heir*, otherwise it would not be a hereditament. The authorities cited by the defendant show conclusively that it is only as regards descent that it is considered as realty. But unless there is some provision in the charter of the Lexington and Ohio Railroad Company, limiting the stock to the *heirs* of the stockholder, the illustration put by the court is not in point.

359] *It must be admitted, however, that the definition of Lord Coke, cited with approbation in *Buckridge v. Ingram*, sustains the position that the franchise was a tenement savoring of the realty; for, in the language of Coke, it was "exercisable within lands." And, as before stated, we prefer to place our decision upon the distinction between the estate of the corporation and the individual rights of its members, rather than upon a distinction between the cases in which the profit arises wholly out of realty, and those in which it springs partly from realty and partly from personalty, though this latter distinction seems to receive much support from both reason and authority.

One more inquiry remains: Is the question before us affected by our statute law? We have seen that the shares in all companies, subject to the provisions of the general railway act, are declared by it to be personal estate; but there is no such express legislative dec-

laration respecting shares in other companies. Nevertheless, a review of our statutes will show that the general policy of the state has been to treat shares in incorporated companies as personalty. They are recognized as such in several acts of the legislature, and the distinction between the estate of the company and the individual rights of the stockholder seems to have been taken at an early day. Thus, by the act of February 8, 1826, amendatory of the general turnpike law (Swan's St. 982), the right of turnpike companies to take tolls was subjected to sale on execution to pay corporate debts, but the shares of the members have never been thus subjected to satisfy individual debts. On the contrary, the mode of proceeding as to such shares is by bill in chancery, filed under the 16th section of the chancery act of 1831 (Swan's St. 704), which gives the court power to decree a sale of "any interest, shares, or stock," owned by a judgment debtor, "in any banking, turnpike, bridge or other joint stock company;" thus placing these shares, in this respect, in the same category with "choses in action," which are, by the same section, subjected in the same way.

*Again: Ever since the ordinance of 1787, a deed, duly [360 executed, and acknowledged or proved, has been necessary to convey a legal title to any land, tenement, or hereditament in Ohio (certain leasehold estates excepted), and hence, if a turnpike, or railway share is a "tenement," as held by the courts of Connecticut and Kentucky, the legal title to it can not be transferred without such deed. Thus, in *Buckeridge v. Ingram*, before cited, it being decided that the shares in the "Avon navigation" were real estate, the master of the rolls held that they did not pass by a codicil attested by but two witnesses, the statute requiring the attestation of three witnesses to a will devising realty. But in this state it has never been considered necessary that a transfer of turnpike or railway shares should be by deed. The practice has been almost, or quite, universal to make the transfer by an ordinary assignment, and were we now to hold that no legal title has thereby passed, there is no telling the amount of mischief our decision would effect. It may be proper here to remark, that if the charter requires the assignment to be made on the books of the company, it must, perhaps, be so made in order to convey the legal title; but it is a little singular that no such provision is found in the general turnpike or railway acts, or in any turnpike or railway charter that has come under our observation.

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Again: The "act regulating dower" provides "that the widow of any person dying shall be endowed of one full and equal third part of lands, tenements, and real estate of which her husband was seized, as an estate of inheritance, at any time during the coverture." (Swan's Stat. 296.) It follows, that if turnpike and railroad shares are real estate, every widow whose husband was, at any time during the coverture, the owner of such shares, is entitled to dower therein, although he may have sold and transferred the same; unless the transfer was by deed of the husband and wife, duly executed, attested, and acknowledged. We can not imagine that the legislature ever intended any such thing.

361] *A reference to the tax laws will show that turnpike and railroad shares have never been treated, for purposes of taxation, as real estate. It would be an unnecessary consumption of time and space to comment on these laws in detail. I will only refer to the second section of the act of March 2, 1846 (44 Ohio L. 85), in which definitions are given of real and personal property. The terms "real property" and "land," are declared to mean and include not only the land itself, whether laid out in town lots or otherwise, with all things contained therein, but also "all buildings, structures, and improvements, trees and other fixtures of whatsoever kind thereon, and all rights and privileges belonging, or in anywise appertaining thereto, including all stoves in any building belonging to the owner of such building, and used instead of fireplaces." Under the head of "personal property," various things are enumerated, among which are: "the capital stock, undivided profits, and all other means, not forming part of the capital stock, of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits, or means, by whatever name the same may be designated."

At the same session of the legislature, the "act relative to incorporations for manufacturing, and other purposes" (44 Ohio L. 37), was passed. This act embraces manufacturing and mining companies, and gives them very large powers of buying, holding, and conveying any lands, tenements, etc. Yet, although the property of some of them, as, for instance, mining companies, must necessarily consist almost wholly of lands, it is nevertheless declared that the stock of the company shall be deemed personal estate, and shall be transferred in such manner as shall be prescribed by the by-laws of the company.

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It is thus apparent that the general policy of our laws is to treat shares in incorporated companies as personal estate, and that whenever the mind of the legislature has been specially directed to the subject, it has settled all doubts by an express declaration to that effect.

*In whatever way we view the case, whether upon adjudication, reason, or our statute laws, we arrive at the conclusion that the shares in question are personal property. The bill must, therefore, be dismissed.

Bill dismissed.

**HORATIO N. KEARNY v. LUCIEN BUTTLES, EXECUTOR, ETC., OF
JOEL BUTTLES, DECEASED.**

A declaration filed under the act of 1816, to prohibit the issuing and circulating of unauthorized bank paper, Swan's Stat. 136, is sufficient, if it contains the requisites prescribed in the 13th section of that act.

The original stockholders in a literary corporation acting within the scope of the granted powers, are not to be made liable for the acts of those who go beyond them; but the act of incorporation can furnish no protection from private responsibility, to those who embark in, or assent to, such unauthorized acts.

It is sufficient in such declaration to aver that the defendant was a stockholder at the dates of the notes, or subsequently, without showing him such at the commencement of the suits.

The decisions of the highest judicial tribunal in the state, in questions affecting rights of property which becomes valuable and changes hands upon the faith of such decisions, will not be disturbed without the most urgent necessity, to prevent injustice or vindicate obvious principles of law.

Johnson v. Bentley, 16 Ohio, 97. Commented upon and affirmed.

ERROR to the late supreme court in Franklin county.

Goddard, for plaintiff in error: *Johnson v. Bentley*, 16 Ohio, 97; *Lougee v. Ohio*, 11 Id. 68; *Bonsal v. Ohio*, 11 Id. 72; *Lawler v. Walker*, 18 Id. 151; *Lewis v. McElvain*, 16 Id. 347; *Hess v. Werts*, 4 Serg & R. 356.

Henry Stanbery, Wilcox, and Swan & Andrews, for defendant in error: *Livingston v. Lynch*, 4 Johns. Ch. 573; *Davies v. Hawkins*,

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3 Maule & Sel. 488; 5 Hill, 386; 8 Mass. 472; 17 Mass. 64; Id. 330; 5 Conn. 28.

363] *RANNEY, J. The declaration filed in this case, in the court below, contained four counts. They each alleged that the plaintiff was the holder of forty thousand dollars of notes issued by the Granville Alexandrian Society, a bank not incorporated or authorized by law to act as such, or to issue notes intended to circulate as money. Two of the counts charged the defendant's testator with being a stockholder at the date of the notes, and the other two with becoming a stockholder subsequently to the dates of the notes. The object of the suit was to recover the amount of these notes under the act of 1816, to prevent unauthorized banking. A general demurrer was filed to this declaration, which was sustained by the court of common pleas, and a final judgment given for the defendant. Several exceptions are taken to the sufficiency of the declaration, which we will notice in their order; first premising that the requisites of the declaration are prescribed by the act under which this remedy is sought. In the thirteenth section it is provided: "That in such suit it shall be sufficient for the plaintiff to set forth, in substance, that he is the holder of such bond, note, bill, or contract; that the defendants were interested in said bank at the date of such bond, bill, note, or contract, or subsequently thereto, and that it remains unpaid." (Swan's Stat. 137.)

It is not doubted that the general assembly had the right to prescribe the mode of proceeding, including the requisites of the pleadings; and it hence follows that the several objections to this declaration must be tested by the foregoing enactment.

It is first insisted that, inasmuch as the Granville Alexandrian Society was duly incorporated for literary purposes in 1807, no new liability unknown to the act of incorporation could, by the act of 1816, be imposed upon any stockholder, as a stockholder, without his consent; nor was any such liability intended to be imposed by said act. If, by this, it is intended to assert that a stockholder in the literary society, acting within the scope of the granted powers, is not to be affected by the unauthorized acts of others who step
364] beyond them, without his *assent, although they may use the name of the corporation, the position is entirely correct. But if it is supposed that the corporation can be used to shield from private responsibility those who act in its name, but go outside of its limits,

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it is untenable, as this court has already decided in the case of *Lawler et al. v. Walker*, 18 Ohio, 151, and *Bartholomew v. Bentley*, ante, 37. But this declaration avers the existence of an unauthorized bank of that name, and charges the defendant's testator as a stockholder in such bank. If an issue was made upon it, it would devolve the obligation upon the plaintiff to prove these allegations; and if he did not, he would fail.

It can make no difference, however, that the name of the unauthorized bank was the same as the authorized literary society, or that most or all the stockholders in the latter engaged in the former. As stated by the court in *Lawler v. Walker*, "If they lose sight of the object for which they were incorporated and engage in other and different pursuits, they must do so under all the obligations and responsibilities of ordinary parties in business."

The next objection to the declaration is that it should have shown the defendant a stockholder at the time or subsequently to the *issuing* of the notes, and also at the commencement of the suit; whereas, the averments have relation to the *dates* of the notes, and the declaration has no averment that he was such stockholder at the commencement of the suit. To the first part of this objection the statute before recited is a sufficient reply. The declaration is in the words of the statute, and it is expressly enacted that that "shall be sufficient." But the reason of the provision is very apparent, and is in perfect harmony with the plain object of the whole law, to furnish the holder of such notes with a simple, speedy, and effectual remedy. As he could have no knowledge of the time of issuing, except from the dates of the notes in his hands, and as that is *prima facie* the true time, it was intended to make such an averment *prima facie sufficient*. In support of the last branch of the objection, we are referred to *the eleventh section of the [365 act. We find no warrant for it in that or any other part of the law; while it is in direct conflict with the 12th section, and, if allowed, would subvert the whole policy of the enactment. That section expressly provides that the holder may recover "against any part or the whole of the persons who were interested in such bank at the date of such bond, bill, note, or contract, or who became interested in such bank *at any time* between that and the commencement of such suit." On the construction contended for, all those who combined in the illegal purpose at the issuing of the notes, or assented to it afterwards by becoming stockholders, could escape all

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responsibility by transferring their stock at any time before suit brought, unless such transfer could be shown to be merely colorable. We think, after the liability has once attached, it can only be avoided by paying the debts for which he has become liable.

It is said that there is no averment that the acts complained of were done after the act of 1816 took effect. The declaration alleges that the notes were issued on the first day of July, 1836, and on divers other days or times between that time and the commencement of the suit; and that the defendant was, at and after the dates of the notes, a stockholder, and is liable by virtue of the statute. How it could be more specific we are unable to see, unless the notes, with their dates, were specifically set forth, which is expressly waived by the defendant upon the record.

Nor has the fourth section of the act of 1840 (also insisted upon) to prevent the circulation of foreign bank notes of a less denomination than five dollars (Swan's Stat. 143), any application whatever to this description of paper.

The last position taken, and which presents the great question in the case, and has been argued at length and with much ability, is that no recovery can be had upon notes of this character, issued between the passage of the act of January 28, 1824, "to regulate judicial proceedings where banks and bankers are parties, and to prohibit issuing of bank bills of certain descriptions" (Swan's Stat. 366] 147), and an act to amend it, passed March 23, 1840 (Swan's Stat. 141). The argument is based upon the twenty-third section of the first named law, which reads: "That no action shall be brought upon any notes or bills, hereafter issued by any bank, banker or bankers, and intended for circulation, or upon any note, bill, bond, or other security given, and made payable to any such bank, banker, or bankers, unless such bank, banker or bankers shall be incorporated and authorized by the laws of this state to issue such bills and notes; but that all such notes and bills, bonds and other securities shall be held and taken in all courts as absolutely void.

This section was repealed by the act of 1840, before alluded to. It is claimed that the section recited repealed, by implication, the sections of the act of 1816, allowing a recovery on notes of the character sued upon in this action; and that this remedy was not revived by the act of 1840, because the act of 1809 provides "that whenever a law shall be repealed, which repealed a former law,

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the former law shall not thereby be revived unless specially provided for." It is admitted that this precise question was made in the late court in bank, in the case of *Johnson v. Bentley*, 16 Ohio 97, and decided unanimously, by the four judges then upon the bench, against the claim now made. But it is insisted that the decision is not law, and we are asked to review it. It is very evident that the simplest justice to our predecessors as well as the public, should prevent us from interfering with decisions deliberately made, merely because a difference of opinion might exist between them and us upon a doubtful and difficult question of construction. But when, as in this case, the decision has relation to large amounts of a species of property which assumes a value in the market, changes hands, and is dealt with upon the confidence reposed in the correctness of the decision of the highest judicial tribunal in the state; nothing short of the most urgent necessity to prevent injustice, or vindicate clear and obvious principles of law, would justify us in departing from it. We are all of opinion that no such necessity exists. On the contrary, we are entirely satisfied *that it [367 promotes justice, sound policy and right, and gives a remedy where one was imperatively demanded, and, as we believe, entirely consistent with the intention of the legislature, whatever may be thought of its abstract correctness or the course of reasoning by which it is sustained.

I do not propose to enter into any extended examination of this case, or the question involved in it; but, as we have been referred to the case of *Milne & Co. v. Huber et al.*, 3 McLean, 212, in the circuit court of the United States, in which a contrary decision to some extent was made, I deem it proper to say that, as this was a question arising entirely upon the construction of our own statutes, it is the duty of the federal courts to conform to our construction, rather than that we should abandon it to follow theirs. For myself, I can not see the least reason for supposing that any part of the act of 1816 was repealed by the act of 1824, by implication or otherwise. On the contrary, it is most manifest that most of the provisions of the act of 1824 were designed to render more effectual the very remedies provided by the act of 1816. It will be observed that the twenty-third section of the act of 1824, copied above, applied only to paper issued *after* it took effect. All such paper, issued before that time, could be recovered upon; and the act of 1816, aided by that of 1824, furnished the remedy; nor is it

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doubted that all such paper issued since 1840 may be prosecuted under the same act. Now if every word and syllable of the act of 1816 is still in force, so that suits may be brought and recoveries had upon paper issued before 1824, and since 1840, with what propriety can it, at the same time, be said to be impliedly repealed? Such appeals, it is agreed on all hands, are not favored, and they only obtain where such seems to have been the obvious intention of the legislature. But the act of 1824 did, as I think, take away, or suspend the remedy given by the law of 1816, as well as by any other law from such paper issued after its passage. The law operated upon a particular class of contracts, and denied a remedy upon them, and required the courts to hold them void; *but 368] it can not, therefore, be said that the legislature intended to repeal a remedial law under which such interdicted contracts might otherwise have been prosecuted, when all its provisions were still required to furnish a remedy for a still larger class of contracts not thus interdicted. As well might it be said that the attachment law would be repealed, if the legislature should deny a remedy under it to one or more of a particular class of contracts now allowed to be prosecuted under its provisions. In short, in my judgment, the interdiction of the law of 1854 was upon the contract, and did not operate upon the law of 1816. What is the consequence? When the interdiction was removed, the remedy was in force, and immediately attached to all contracts falling within its provisions. This would be unquestionably so, unless the interdicted contract was absolutely void, in which case neither courts nor legislatures can make it valid. The court, in *Johnson v. Bentley*, held that these contracts were not void in such sense that, the prohibition being removed, they could not be enforced. And in this the case agrees with the one cited from *McLean*, where it was expressly held, in respect to these very contracts, that "the repeal of a prohibitory act does not make valid contracts entered into against law; but the legislature may give a remedy on a contract founded on a valuable consideration where no remedy exists. It may not only remove the prohibition, but, where justice and good conscience require, suit may be authorized; and such a law does not impair the obligation of the contract, is not an *ex post facto* law, nor does it in any respect conflict with the federal constitution." And the learned judge goes on to pronounce such a remedy highly just and proper. It is true, in that case, that the legislature expressly gave the remedy after the

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paper was issued ; but no reason can be given, if the legislature may provide a retrospective remedy upon such contracts, why the courts may not apply one already existing, which is the case here, if I am right in supposing that the act of 1816 was not repealed. The case is to the point, to show that these contracts are not so far void, but that a proper remedy existing, they may be enforced. That remedy Judge *McLean found in the subsequent legislative act, while the court in *Johnson v. Bentley*, found it in the still existing law of 1816.

On the whole, we are of opinion that the declaration was sufficient, and that the court of common pleas erred in holding otherwise, and the supreme court in affirming the judgment.

The judgment is reversed and the cause remanded.

LESSEE OF CHARLES A. MOORE AND OTHERS v. THOMAS STARKS.

In a chancery proceeding, where it appears *affirmatively* that minor defendants have not been served with process, a decree purporting to determine the rights of such minors is void.

The appointment of a guardian *ad litem* for minor defendants, who have not been served with process, does not effect an appearance for them, nor give the court jurisdiction over them ; but that the appointment of a guardian *ad litem* is for the purpose of defense, after appearance has been effected by service of process on the infants.

A proceeding to foreclose a mortgage on real estate, although in the nature of a proceeding *in rem*, is still an adversary proceeding, in which the right of the mortgagor is necessarily to be passed on, and he is entitled to his day in court ; and before the court can act, it is necessary that it should acquire jurisdiction over the person of the defendant, as in any other adversary proceeding, jurisdiction over both the person and the thing are absolute requisites to the validity of its action.

ERROR to the common pleas of Clermont county, reserved in the district court in that county.

The action below was ejectment, brought by plaintiff in error, the lessee of the children and heirs at law of James Parker, who died intestate in 1827, seized of the *locus in quo*.

Upon the trial, the plaintiff having proved that his lessors were

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the heirs at law of James Parker, deceased, and title and possession in their ancestor, at the time of his death, rested his case.

The defendant then offered the record of a chancery proceeding in Clermont county, in the year 1831, in which William L. Patterson [370] son was complainant, and the administrator, *widow, and heirs at law of James Parker, deceased, were defendants, the heirs at law being all minors.

The bill was for foreclosure of a mortgage executed by Parker in his lifetime, to the complainant, for the tract described in the plaintiff's demise.

The return upon the subpoena issued upon this bill is shown by the record to be as follows :

"Oct. 18th, 1831. This subpoena, Nathaniel Sweet, Thomas Thornburgh and Mary, his wife, by reading, the others named in the within writ not subpoenaed. WM. CUREY, Sheriff."

The record also shows an appointment of, and answer by, a guardian *ad litem* for the minor heirs, who were the defendants not served.

At the August term, 1832, decree was rendered for the sale of the premises, in the bill described, upon default of payment of the amount found to be due the complainant; and a sale having been made to William L. Patterson, the complainant, it was, at the November term, confirmed, and a deed ordered to be made to the purchaser, under whom Starks, the tenant in possession, now claims.

To the admission of this record in evidence, the plaintiff objected, but the objection was overruled, and the record admitted, to which the plaintiff excepted, and a bill of exceptions, setting out the record and all the testimony in the case, was then taken.

The court of common pleas, to which the cause was submitted without the intervention of a jury, then gave judgment for the defendant, to reverse which this writ of error is prosecuted.

The arguments of counsel were not furnished to the reporter.

Jolliffe, for plaintiff in error.

Fishback, Ewing, and Shields, for the defendant.

CALDWELL, J. The original proceeding in this case was an action of ejectment, brought by the plaintiffs in error, who claim as [371] the children and heirs of James Parker, deceased. *James Parker died intestate in 1827, the owner of the tract of land in controversy. He left a widow, Mary Parker, who has since mar-

ried Thomas Thornburgh, and three small children, viz., Caroline, now the wife of Charles A. Moore; Delilah, now married to John Fenton; and Leah Ann, married to Charles Harrison.

The plaintiffs having proved heirship and title in their ancestor, rested. The defendant then offered in evidence a record of certain chancery proceedings, commenced in 1831, by William L. Patterson, on a mortgage given by James Parker, in his lifetime, to William L. Patterson and John Chambers, on the property in controversy, which proceedings resulted in a sale of the property and conveyance to William L. Patterson, under whom the defendant claims title. The plaintiffs objected to the introduction of this record, claiming that they had not been made parties to the proceeding, the court overruled the objection, admitted the record, and a verdict and judgment was given for defendants. The bill in the chancery case sets forth the property as belonging to James Parker, deceased, and correctly stated who were his widow and children, and prayed process against them; a subpoena issued for all of them, and was returned indorsed on the back of the writ as follows: "October 18, 1831. This subpoena, Nathaniel Sweet, Thomas Thornburgh, and Mary, his wife, by reading, the others named in the within writ not subpoenaed.

WM. CURRY,

Sheriff."

The court appointed John Winner, a distant relative of theirs, guardian *ad litem* for the infant children. The guardian *ad litem* filed his answer under oath, and the court proceeded to hear and dispose of the case.

From the date which the papers afford, we infer that the youngest child at this time was about five or six, and the oldest nine or ten years of age. They were living with their mother and her husband, Thomas Thornburgh.

The great question presented in the case is whether the court in this chancery proceeding obtained jurisdiction over *the [372 children, so as to dispose of their rights. If the court obtained jurisdiction over their persons, it matters not what errors may have intervened, the proceedings can not be collaterally impeached, but must be held valid until reversed. If, however, that jurisdiction was not obtained, the record was a nullity, and the court erred in permitting it to be given in evidence.

The defendants in that case resided within the county in which the land lies; the statute in such case requires that the process shall

be subpoena, and that it shall be served on the defendant personally, or left at his usual place of abode.

None of these requisites were performed here, or attempted; the return directly negatives personal service, and precludes the supposition that a copy was left at their place of abode, as it states that the subpoena was served on Thornburgh and wife by reading. The statute requires service to be made, and we can not dispense with its requisitions. Nothing discretionary is left with the court. The legislature have prescribed the means by which the courts shall obtain jurisdiction, and the courts can not determine that anything short of such means shall give them jurisdiction. It is sometimes said that it can be a matter of no importance whether children, such as these were, are served with process or not; to this we can not give our assent, but, even if it were so, it is a suggestion proper for the legislature—not for a court; the legislature makes the rules, and the courts have to be bound by them. The return of the officer is the evidence to the court and to the world of the fact that the party has been subjected to its process or not; whether he has been brought into court; whether jurisdiction is claimed to have been obtained over his person. If the process is returned served, it is proof of that fact. If the return is no service, it is proof equally explicit that no service has been made, and is notice to the world, as well as the court, to parties and their friends, that no service is claimed to have been made. And here we will remark, that this case differs from cases in which the record is silent 373] on the subject of process or service. In such cases it has been held that, although the decree of the court is reversible for error, not showing affirmatively a necessary fact, yet, because a court of general jurisdiction has assumed to exercise jurisdiction of the case, it will be presumed that, notwithstanding the silence of the record, the court had obtained jurisdiction over the person of the defendant. That presumption is rebutted and precluded in this case by the positive statement of the record that no service was made. For it is to be remarked, that in those cases where the record being silent on the subject of service, jurisdiction has been presumed, it has always been held that it was competent for the defendant to rebut the presumption of service, by affirmative proof that he had not been served, and then the record becomes a nullity, and can be collaterally impeached.

The record in this case furnishes the proof that no service was in-

fact made. This case too is distinguishable from a class of cases, which have been the subject of frequent controversy in our courts, where lands have been sold by an administrator for the payment of debts. In these cases it has been held that service on the infant heirs was not necessary to give the court jurisdiction. But in these cases it will be found that the courts rest their decisions on the peculiarity of the proceeding and the statute, and on the ground that the administrator is the representative of the estate of the creditors, and indirectly of the interests of the heirs; and in all of these cases the courts have been careful to draw a distinction between that class of cases and a chancery case like the present.

It has been suggested that a bill filed to foreclose mortgaged premises is a proceeding *in rem*, and that therefore the court obtained jurisdiction without bringing the defendants into court. A proceeding to foreclose mortgage premises is a proceeding, in one sense, both *in personam* and *in rem*. It is a proceeding *in personam*, because it seeks to charge a defendant with a debt. An account has to be taken against the defendant before the property can be *subjected, and the account thus found becomes a [374 debt of record against the defendant, after the mortgaged property is exhausted, and now the decree may be so framed that after the mortgaged property is exhausted, execution can be had on the decree for the residue found due, as on judgments at law. *Hamilton v. Jefferson*, 13 Ohio, 427. *Myers et al. v. Hewett*, 16 Ohio, 456. But even if it was not a debt of record, or if no execution could issue after the mortgaged property was exhausted, it would be necessary that the defendant should be in court to contest the claim, or ascertain the amount, as much where the claim is to be enforced against a particular piece of his property as where it is to cover his property generally. It is a proceeding *in rem* so far that it is necessary that the property sought to be especially appropriated should be within the jurisdiction of the court. In this sense it is a proceeding both *in personam* and *in rem*, and requires that the court should have jurisdiction both of the person and of the thing. It is a proceeding in chancery, and comes within the letter of the law requiring the defendants to be served with subpoena, and there is nothing in the reason of the thing to take it out of the general rule.

A majority of the court are of opinion that as the children of James Parker have not been served with process, the decree so far

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as it attempts to divest their title is void, and that the court of common pleas erred in permitting the record to be given in evidence. The judgment will therefore be reversed and the cause remanded to the common pleas for further proceedings.

THURMAN, J., dissenting.

I think the decree in question is not void, but only erroneous. It has been uniformly held that an order of sale, upon an administrator's petition under the act of 1824, is not void because the infant heir was not actually notified, although the statute required him to be made defendant. *Ewing's lessee v. Higby*, 7 Ohio, pt. 1, 198; *Ewing v. Hollister*, Id. pt. 2, 138; *Robb v. Irwin*, 15 Ohio, 689; *Lewis v. Lewis' Adm'r*, Id. 715; *Snevely v. Lowe*, 18 Ohio, 368.

375] *Indeed an answer by a guardian *ad litem* has been deemed sufficient to protect such an order from reversal. *Ewing v. Hollister*, and *Lewis v. Lewis' Adm'r*, above cited.

In *Adams v. Jeffries*, 12 Ohio, 253, the act of 1824 was not under consideration, and the opinion there expressed that, since 1824, jurisdiction could not be acquired without service of process upon the heirs, is unsupported by either the previous or subsequent decisions.

It is said, however, that there is a material difference between an administrator's petition and a bill of foreclosure; that the interests of the administrator and heir are not adversary; that, for certain purposes, the administrator represents the whole estate, all of it, both real and personal, being assets for the payment of debts; that he has no interest to do wrong, and if he do, the administration bond protects the heir. That, on the other hand, mortgagee and mortgagor are adversary parties, and the latter is without protection unless he has his day in court.

Without denying the force of this argument, were it addressed to the legislature, as a reason for distinguishing between the two cases, I yet can not see that it renders the decisions I have cited inapplicable to the present. Whether policy did or did not demand it, the act of 1824 provided that the heir should be made defendant. The chancery practice act does nothing more, except to prescribe the means by which an appearance shall be effected. Both acts contemplate that the defendant shall have notice and a day in court. And if there is a substantial want of compliance with either statute, the proceeding under it is erroneous, but if jurisdiction has

attached, it is not void. Now, it might be argued, with no small show of reason and authority, that in a case like the present, and in that of an administrators' petition, the subject-matter of the proceeding, the land, gives jurisdiction, and that if the order, or decree, is reversible because the heir or mortgagor was not notified, it is so merely because the statute requires such notice. Both proceedings are quasi *in rem*, and before 1824, one of them, the petition, was *strictly so. It was wholly *ex parte*, there being [376 no defendants to it, nor any notice of it given to anybody. It was simply presented to the court, and the proper proof being made, the order of sale followed. So, from 1802 to 1831, during which period the remedy of *scire facias* upon mortgage existed, a return of *nihil* upon two such writs effected the appearance of the mortgagor, and authorized a judgment and a sale of the premises. Now we all know that this was no notice at all. The return of *nihil* was an idle ceremony, and it was the land that, in reality, gave jurisdiction. In other words, the proceeding was *in rem* substantially. Yet it was always sustained by the courts, and no one doubts its legality.

That proceedings by bill to foreclose a mortgage are quasi *in rem* has been often affirmed. In *Hamilton v. Jefferson*, 13 Ohio, 429, the court, speaking of such proceedings, said: they "are not technically, it is true, but substantially, *in rem*. The property is converted to pay the debt. The decree is inoperative beyond this." True, it is added that, "a decree might easily have been so framed that any balance due after the sale, and application of the proceeds of the securities, would have been a debt of record, having the same force and effect as a judgment at law, and on which execution might have issued." I have no fault to find with this *dictum*, limited to a case like that in which it was pronounced, namely, to one in which the defendant's appearance is effected by service of process. It may be well enough in such a case, the parties being actually before the court, to prevent a multiplicity of suits by doing complete justice in the premises. But where the defendant is only constructively notified, as by publication, I imagine that no decree *in personam* can be rendered against him. *Graham v. Sublett*, 6 J. J. Marsh. 44. Yet, in either case, so far as the title to the land is to be effected, the proceeding is substantially *in rem*.

It is unnecessary, however, to push our inquiries beyond the present case. Here, not only was the land within the jurisdiction of

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the court, but service, not strictly regular it is true, but yet afford-
377] ing actual notice, was made on the mother *and step-father
of the infants, with whom the latter, being of very tender years,
resided. A guardian *ad litem* was appointed, accepted the appoint-
ment, and answered. The cause went to hearing and the decree
in question was rendered. And the point to be decided is, whether,
under such circumstances, the decree is void or merely erroneous.
We have seen that had it been an order of sale, upon an adminis-
trator's petition under the act of 1824, it would not be void.
And I think some reasons have been given why a decree of fore-
closure ought to stand upon the same ground. But let us see the
authorities.

Massie's *Heirs v. Donaldson*, 8 Ohio, 377, was a bill of review to
reverse a decree in chancery, rendered on a bill for the specific exe-
cution of a real contract. One of the errors assigned was that the
defendants to the original bill were not served with process. They
were minors, and a stranger was appointed guardian *ad litem* for
them; but, although served with process, he neither filed an an-
swer, nor even accepted the appointment. The court, after re-
marking that the English practice is to serve infant defendants with
process, except under peculiar circumstances justifying substituted
service, proceeded as follows :

"These exceptions, however, proceed upon the very principle on
which the rule requiring service on the infants is founded. Ser-
vice on them would be very absurd, if it were not intended by that
means to apprise their relations of the institution of a suit, and
thus put it in the power of those most deeply interested in their
welfare to protect their interests.

"In Ohio, it has not been the general practice to make service on
the infants. A very loose mode of doing business has universally
prevailed. This is greatly to be regretted, since as much mischief
might be created by returning to the old and regular practice as
has been occasioned by the original departure from it. The prac-
tice of every court may be said, sometimes, to constitute the law
of the court; and perhaps even this practice may be entitled to
378] respect, if it is *the creature of inveterate usage. But it is
unnecessary now to decide this point, as there are so many other
errors in these proceedings."

From this it appears that the court doubted whether a decree
was even reversible, because the infant defendants had not been

served with process. It looks as if the inclination of their minds was to sustain it. I think it may be safely affirmed that they would not have held it void.

In *Robb v. Irwin*, before cited, Judge Hitchcock, delivering the opinion of a majority of the court, said :

“It seems to me to be unnecessary, in this case, to go into an investigation of the question whether infants can be made parties to a suit in chancery, so as to be bound by a decree, without personal service, merely by the appointment and appearance of a guardian *ad litem*. Much is said in the books upon the subject. But I apprehend it will be found, upon examination, that decrees entered under such circumstances are generally, if not universally ‘holden to be voidable, not void. Such, I have no doubt, is the weight of authority.’”

In *Carrington v. Brent*, 1 McLean, 174, the circuit court of the United States, in Kentucky, speaking of a suit brought in Halifax county, Virginia, for the specific execution of a real contract, said :

“It does not appear that in the above suit process was served on the infant, nor that the guardian *ad litem* was appointed by the court, and for these omissions or errors in the proceedings the decree might be reversed by an appellate court; but when the decree is used as matter of evidence, it can not be disregarded or treated as a nullity. Much may be presumed in favor of the proceedings of a court regularly constituted, and which exercises a general jurisdiction; and especially after the lapse of many years.”

Entertaining these views, the court admitted the record as evidence, without requiring the production of original proofs, and decreed for the complainant. Indeed, it may be said to have enforced the Virginia decree, and so it was considered *by the su- [379] preme court of the United states, to which the cause was taken by appeal, and by which the decree of the circuit court was affirmed. In fact, the supreme court appears to have gone farther than the circuit court, for Chief Justice Marshall, delivering its opinion, said :

“The proceedings in the county court of Halifax, in the suit brought in 1815, are perfectly regular, and, according to the constitution and laws of the United States, and the decisions of this court, are allowed the same full faith and credit in the court of Kentucky that they would receive in Virginia. If the decree pronounced by the court of Halifax, in 1817, and afterward affirmed

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in the superior court of chancery at Lynchburg, would have been enforced in Virginia; or if, had it been pronounced in Kentucky, it would have been enforced in Kentucky, then the decree for enforcing it, which was pronounced by the court of the United States sitting in Kentucky, is correct." *Caldwell v. Carrington*, 9 Pet. 101. And, as I have before said, it was held to be correct, and therefore affirmed.

In *The Bank of the United States v. Cockran*, 9 Dana, 395, it was expressly decided that a decree respecting realty, against an infant who had not been served with process, or otherwise notified of the suit, but for whom a guardian *ad litem* had been appointed, is not void. And this decision is directly in point, for it affirmatively appeared in the record, as fully as it does in the present case, that the infant had not been notified. Indeed, there is more reason for saying that, in the present case, there was notice, than existed in that case; for here the mother and step-father of the infants, in whose custody and care they were, had notice—irregular, it is true, but still actual.

Bustard v. Gates, 4 Dana, 430, is another case in point, or substantially so.

Our attachment laws require notice of the issuing of the writ to be given by advertisement. Yet the want of such notice does not render the judgment void. The affidavit, writ, and levy give jurisdiction. The absence of notice only *makes the judgment voidable. *Paine v. Mooreland*, 15 Ohio, 435. Now whatever may be said of an administrator's petition, it will not be denied that an attachment is as adversary a proceeding as a bill of foreclosure. Nor will it be gainsayed that the advertisement is required by as stringent a statutory provision as is a subpoena. Nor will it be pretended that the levy of an attachment on real estate any more gives notice to the defendant than does the filing of a bill in chancery.

Without multiplying authorities or reasons, the conclusion to which our examination leads me, is that where the subject-matter of the suit must be within the jurisdiction of the court, in order to give jurisdiction, and it is within it, and the proceeding, though not technically, is substantially *in rem* as a bill of foreclosure is admitted to be, and was decided to be in *Hamilton v. Jefferson*, before cited, and a guardian *ad litem* is appointed and answers for the in-

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fant defendant, who has not been served with process, or notified by publication, the decree is not void, but only erroneous.

The decision just pronounced I understand to be limited to cases in which it affirmatively appears in the record that the defendant was not served with process or otherwise legally notified. With this limitation, it may, possibly, affect but few rights. But it is difficult to see how the case would be different in principle, if it did not so affirmatively appear. True, it is said that if the record were silent upon the subject, service might be presumed. It would not be presumed, however, were the decree directly impeached by a bill of review. No one pretends that. Why, then, should it be presumed when it is impeached collaterally? It is not by force of presumptions that, in the one case, a decree is held voidable, and, in the other, valid. A decree, merely erroneous, is unassailable collaterally, not because it is presumed to be correct, for the contrary may be manifest, but because collateral issues are seldom allowed, and because it is only upon a bill of review that the rights of the parties can be properly heard and adjusted.

Judgment reversed.

***ESTHER JENKINS AND OTHERS v. ENOCH PEARSON AND [381
OTHERS.**

To authorize the district court to reserve a cause, and send it to the supreme court for decision, on account of the character of the questions which arise in the case, the questions should be such as require the decision of the court of *dernier resort*, and not such as are well settled and of familiar application.

In chancery. Reserved by the district court in the county of Miami, for determination by the supreme court.

BARTLEY, C. J. This is a bill in chancery, by which the complainants seek to set aside the conveyance of a tract of land situate in Miami county, Ohio, made by Enoch Pearson, deceased, in his lifetime, to the respondents, Enoch and Peter Pearson. The prayer of the bill is predicated on the following alleged grounds:

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1st. The mental imbecility of the grantor at the time of the conveyance.

2d. That the grantees obtained the conveyance by fraud and undue influence, practiced on the grantor, and for a grossly inadequate consideration.

The principles of equity applicable to this case are familiar and well settled; and the determination of the case depends simply upon the weight of the evidence.

The cause came into this court by reservation, not on account of a division of opinion in the district court, but with a view to the character of the questions presented in the case. The fifth section of the statute "relating to the organization of courts of justice, and their powers and duties," passed February 19, 1852, provides that causes pending in the district court may be reserved and sent to the supreme court for decision, when "important and difficult questions shall arise." 50 Ohio L. 68.

The questions presented in this case are not such as authorized the district court to send the case here for decision. To authorize the reservation of a cause in the district court to be sent to the supreme court for decision, on account of the nature *of the questions presented, they should be such as require the decision of the court of last resort, and not such as are already settled and of familiar application.

The cause is therefore remanded to the district court.

DAVID SCOTT v. ROBERT CLARK AND OTHERS.

A paid money into the treasury of a California mining company, to entitle B to membership therein, upon agreement that A "should have a full half share of all that B is entitled to by being a member of said company."

A may recover only the one-half of the net proceeds of the share assigned to B, upon the dissolution of said company.

B is entitled to a deduction therefrom of a reasonable amount to cover expenses of his return from California.

Under the constitution of the company, the same might be dissolved at any time, by vote of two-thirds of its members.

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The acquisitions of B, whilst in California, subsequently to the dissolution of the company, were his individual property, and A had no interest therein.

THIS is a bill in chancery, reserved in the district court in Guernsey county. The case fully appears in the opinion of the court.

Cowen & Peck, for complainant.

Kennon, for defendant.

CORWIN, J. By a written contract of the parties, of April 9, 1849, Scott bound himself to pay into the treasury of "The Oxford-California Mining and Trading Company," the sum of one hundred and seventy-five dollars, to entitle Clark to membership therein. Clark bound himself "to give said company the privilege of retaining and paying over to the said Scott, his heirs or assigns, a full half share of all that he is entitled to by being a member of said company."

Scott paid the money, and Clark signed the constitution of the company on the 10th day of April, 1849, and went with the company to California, and remained and served with them [383 until the final dissolution of the company, on the 10th day of April, 1850.

The eighth article of said constitution provides that "this company shall continue to exist for one year from the time of leaving Middletown, unless two-thirds of the members determine otherwise. But in no case shall the company be dissolved, or a dividend struck, until their return to the United States."

The fourteenth article provides, "that any article of this constitution may be altered or amended, at any time by a vote of the members, except the tenth (relating to compensation to sick and dying members), which shall in no case be altered or amended." On the route to California, one of the members, Mosier, died; and after their arrival there, another, Morrison, left the company. The remainder of them located on Gold Run, in September, 1849, and continued their operations there until the 10th of April, 1850; which was just one year from the time they left Middletown; when, by a unanimous vote, the company was dissolved, and each member thereafter acted for himself. At the dissolution, Clark's share of the assets was ascertained to be \$1,780; one-half of which, subject to a deduction of the amount due to the representatives of the

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deceased member, under the tenth article, and of a reasonable amount to defray expenses home, Clark proposed to leave with the treasurer of the company, for the use of Scott; but the treasurer refused to receive it, and the whole amount was paid over to Clark.

On the 22d of February, 1850, under the rules and usages of California miners, a new "claim" was made by the company, on Deer Creek, as a place for future operations; to maintain which, two members of the company went, every ten days, and threw up earth, and "made marks" upon it, as evidence of the continuance of their claim. This claim was not susceptible of being worked in the winter and early spring, on account of wet weather. And, in fact, no gold was digged, or work done upon it, until after the 10th 384] of *April, 1850; when Clark and two or three others went there and commenced digging. Clark sold his interest in this claim for \$1,000. Soon afterward he bought another claim for \$3,000, which he sold in a few days thereafter for \$6,000, and returned home.

This bill is filed for a settlement of the account between the parties; and it is claimed by complainant that he is entitled to one-half of the net proceeds of Clark's trip to California; and by defendant, that he is liable only for one-half of what he realized, as a member of the company, during the continuance of its organization.

Although the eighth article of the constitution of this company provides that the company shall not be dissolved, or a dividend struck, until their return to the United States; yet, it also plainly contemplates and provides for a disorganization of the company, for all business purposes, and a cessation of all further enterprises and operations by the company, as such, whenever two-thirds of its members should so determine; and the restraining clause of said article was evidently designed only to secure the dividends to be made after their return to the United States. And we can not give such a construction to the article as to say that, by its force, after the company was in fact disorganized and disbanded, by a unanimous vote of the members, and its assets divided, and each had gone to work on his own account and his own responsibility, the company still existed, and that the individual acquisitions of each should belong to the company. It certainly was never so intended by the parties, and such a construction would be inconsistent with the other power contained in the same article, namely, the power

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of two-thirds of the members, at any time, to determine its existence. But we are relieved of any difficulty in the construction of this article, by the fact proven in the case, that prior to the dissolution, the members of the company, as they might rightfully do, under the fourteenth article, above quoted, amended the eighth article, by rescinding the clause requiring their return to the United States before dividend.

* The rights of complainant are, therefore, necessarily limited [385] to the one-half of the interests of Clark, as a member of the company, at the time of its dissolution. This of course excludes from the account the proceeds of the claim which Clark subsequently purchased and sold, and leaves us only to consider whether the interest sold by Clark in the Deer Creek claim was held by him in his own right, or as a member of the company.

The testimony of all the surviving members of the company has been taken; and, although some of them speak of the "claim" having been made and located by the company; yet the other facts and circumstances testified to, make it clear that such "claim" was never designed for the benefit of the company, as such, and never was owned or worked by the company. Before the "claim" was located, the dissolution of the company had been resolved upon—the claim was worthless until it could be worked; and it was impossible to work it until late in the spring, on account of wet weather—it being that description of claim known in California as "wet diggings." The company was dissolved and its assets divided, without any reference to this "claim," and it was ultimately resorted to, by a part only of the members, after the dissolution. We think this item can not be included in the account between these parties.

The defendant claims to be allowed a commission of seven per centum for the custody and care of transportation of the gold dust, and has proven such charge to be customary; but he has not shown that he was subjected to any expense for insurance, or otherwise, on account of such transportation; and we think that, upon a reasonable allowance for the expenses of a safe and convenient passage from home, this charge ought not to be allowed.

A decree may be taken by complainant for one-half of the sum of \$1,780, received by defendant at the dissolution of the company, deducting therefrom the sum of \$254, the amount due the estate of Mosier, for which a decree was entered below, and the sum of \$500,

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386] to cover defendant's *expenses home, with interest upon the balance thus ascertained, from the time of the filing of the bill. Each party to pay his own costs.

Decree accordingly.

JAMES WELLS v. WARRICK MARTIN & Co.

A judgment of a court of competent jurisdiction, rendered by consent of parties, will not be reversed on error.

Where no assignment of errors is filed, the judgment may be affirmed for that reason.

A plaintiff will not be permitted to allege errors, *visz voce*, at the hearing, which he has not assigned.

Papers not set out in, or attached to, the bill of exceptions, or, in some way so connected therewith as to make them a part thereof, can not be taken as parts of the bill.

An erroneous admission of testimony, on a trial by jury, is of no moment, if the jury be afterward, by consent of the parties, discharged without rendering a verdict.

The affidavit of a party to a suit may be received to prove the loss of a writing, in order to let in secondary evidence of its contents.

The fact of loss is to be established to the satisfaction of the court, not conclusively, for that is not required, but reasonably. To do this may, in some cases, where there is more than one party on the side offering the testimony, require the affidavits of all of them. In other cases, an affidavit of one of them may be sufficient. No general rule can be laid down upon the subject. The ruling must depend upon the circumstances of each case.

ERROR to the late supreme court in Columbiana county.

Upham, for plaintiff in error.

Lee, for defendant in error.

THURMAN, J. Martin & Co. sued Wells in assumpsit on a promissory note, in Columbiana common pleas. On trial, a bill of exceptions was signed and sealed, which is in these words:

"Be it remembered, that this case came on for trial upon the pleadings which are referred to. The plaintiff not producing the 387] note described in the declaration, offered in evidence to *the 332

court to prove the loss of the same: 1st. The affidavit of Frederick Kahl, on proof that he was one of the firm of Warrick Martin & Co., to which defendant objected upon the ground that the affidavit of both partners ought to have been obtained, and that one, without all or both, was not admissible; and also that the affidavit of a party to the suit is not admissible for the purpose for which this was offered. 2d. The depositions of Ira B. McVay and James G. Coffin, which are referred to. The counsel for plaintiff then claimed that they had given sufficient proof of the loss of the note, to be admitted to prove its contents by secondary evidence, and the court so ruled. Thereupon, the counsel for the defendant excepted to the decision of the court; and, by consent, a juror was withdrawn and judgment rendered for the plaintiffs for the amount of their note. To which decision of the court, permitting secondary evidence to be given of the contents of said note, the defendant excepted, and his exceptions are here signed, sealed, and ordered to be made part of the record."

The journal entries show the withdrawal of the juror, a discharge of the remaining jurors, and the tendering, signing, and sealing of the bill of exceptions; after which follows the judgment in these words:

"It is, therefore, *by consent of the parties*, considered and adjudged by the court that the said Warrick Martin & Co. recover against the said Wells, defendant, their damages of \$292, assessed by the court, and costs herein expended to be taxed."

On error, the supreme court in Columbiana county affirmed this judgment. Whether any assignment of errors was filed in that court we can not tell. None appears in the record.

The present plaintiff now assigns for error:

1. "The admission of the affidavit of Kahl, one of the plaintiffs below, without the affidavit of the other plaintiff and partner, who had equal access to the custody of the papers, etc., of the firm.

*2. "In holding that the evidence given by plaintiff [388 below, of the loss of the note in suit, was sufficient to admit secondary evidence of its contents to be given to the jury."

It is a sufficient answer to this assignment that it is shown, both by the bill of exceptions and the journal entries, that the judgment was entered "by consent of the parties." It requires no argument to prove that a judgment, thus rendered by a court of competent jurisdiction, can not be reversed on error. Again: It

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does not appear that there was any assignment of errors in the supreme court. Now, a revising court will not look for errors that are not assigned. If there is no assignment it may affirm the judgment for that reason. An assignment is indispensable. It is a pleading upon which an issue is to be made by demurrer, joinder, or plea. True, if the defendant fail to file either of these, the case may be considered as if he had filed the common joinder, which is the same as a demurrer. But parties will not be allowed to waive an assignment, and throw upon the court the task of hunting errors. Nor will the plaintiff be permitted to allege errors, *viva voce*, at the hearing, which he has not assigned.

Again: The errors now assigned are based upon the admission of an affidavit; and the ruling that the testimony was sufficient to let in secondary evidence of the contents of the note. But none of this testimony is before us in a way that we can take notice of it. True, the record contains an affidavit of Kahl, and depositions of McVay & Coffin; but they are neither incorporated in the bill of exceptions, or attached to it or referred to in it by any mark or particular designation.

In *Hicks v. Person*, 19 Ohio, 446, the court, speaking of bills of exceptions, said: "It will not do, as is sometimes attempted to be done, to refer to the records of courts, or records of deeds, and attempt to make them parts of bills of exceptions. It will not do to refer to depositions on file, by the names of the deponents, or by artificial marks upon the depositions themselves, without something beyond this. They must be attached to or made part 389] of the bill of *exceptions; so that, when a record of the case shall be made, they can be introduced into that record as constituting a part of the case."

These remarks apply with their full force to the present case; for we have nothing before us to show that it was either right or proper to insert the affidavit and depositions aforesaid in the record, or that they are the same affidavits and depositions mentioned in the bill of exceptions. But there is yet another view that is fatal to the plaintiff in error. The testimony spoken of was given on the trial by jury. But, by consent of parties, the jury was discharged without rendering a verdict, and the cause seems to have been submitted to the court.

Now it does not appear what, if any, testimony was given to the court. The record states that the judgment was by consent of the

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parties. Errors accruing upon a previous trial that was put an end to by the withdrawal of a juror, are plainly of no moment.

But were the case such that we could consider the rulings complained of, the result would be the same. The affidavit of Kahl was properly admitted. That the affidavit of a party to a suit may be used to prove the loss of a writing, in order to let in secondary evidence of its contents, is too well established to admit of question. *Donaldson v. Taylor*, 8 Pick. 390; *Chamberlain v. Gorham*, 20 Johns. 144.

But it is said that an affidavit of Martin ought also to have been produced. Suppose it were so, that would only prove that Kahl's affidavit was not of itself sufficient. It would not make it inadmissible as evidence.

Was there, however, any necessity for Martin's affidavit? A *prima facie* case of the loss of the note was to be made to the satisfaction of the court.

The fact was to be established, not conclusively, that is not required, but reasonably. To do this may, in some cases, where there is more than one plaintiff, require the affidavits of all of them. In other cases, an affidavit of one of the plaintiffs may be sufficient. No general rule can be laid down upon the subject. The [390 ruling must depend upon the circumstances of each particular case. *Page v. Page*, 15 Pick. 368.

In the case under consideration, there was not only Kahl's affidavit, but also the depositions of *McVay* and *Coffin*. Each of these tended to prove the loss of the note, and altogether established the fact, as we think, quite sufficiently.

Judgment affirmed.

WILLIAM D. PRICE AND OTHERS v. WILLIAM F. JOHNSTON AND OTHERS.

The decree of a Virginia court for the sale of lands lying in Ohio is entirely inoperative to transfer or affect any interest of the owner, either legal or equitable.

The holder of a warrant for lands, in the Virginia military district, before location or entry, has no such specific equity to any particular tract as a court of chancery can notice or enforce.

An entry and survey, made in the name of a deceased person, is, upon general principles, void. It does not appropriate the lands included in it, nor, in such case, does the equitable title pass from the Government to his heirs.

The proviso in the act of Congress of March 2, 1807, "to extend the time for locating Virginia military warrants," etc. (2 U. S. Stat. at large, 424), does not confirm, or make valid, such entries and surveys, so as to vest any specific equity to the lands in such heirs.

But such entry and survey, under said proviso, has the effect to *withdraw the lands* included in it from subsequent location upon other warrants, and to leave the title, legal and equitable, in the Government, and while it remains there subject to appropriation only upon the warrant on which such attempted entry and survey was made.

The purchasers of the land under said void decree, it being repudiated by the owners of the warrant, are not estopped from averring that said entry and survey are void, for the purpose of showing that the complainants have no specific equity in the land, and therefore no right to demand the legal title.

CHANCERY. Reserved in the district court of Hardin county. The facts sufficiently appear in the opinion of the court.

Henry Stanbery, for complainants.

391] *P. B. Wilcox*, for defendants: *1 Cranch. 24; 4 Bibb. 249, 385; 6 Pet. 261; 3 Marsh. 208; 5 Cranch. 223; 7 J. J. Marsh. 529; 4 Id. 610; 7 Wheat. 212; 7 Ohio, pt. 1, 73, 173; 12 Id. 354; 13 Id. 368; 12 Pet. 264; 4 Id. 345; 7 How. 262; 2 Bibb. 597.

RANNEY, J. The bill in this case is prosecuted to compel the defendants, Johnston and wife, to surrender to the complainants, the heirs of William Price, late of Richmond, Virginia, the legal title to one thousand acres of land, included in survey No. 10,030 in the Virginia military district. Price died in 1808, intestate, leaving a widow and five children, all minors. At the time of his death, he was the owner of a large quantity of land in this district; some in his own right exclusively, and some in company with one Robert Means; and held partly by warrant, partly by entry and survey, and partly by patent. Means died in the same year, leaving a will; and some time after his death his executor instituted proceedings for partition in one of the courts of Virginia, which resulted in apportioning to the heirs of Price 15,890 acres, including the lands in controversy. So far as this tract is concerned, neither the entry or survey had been made at the death of Means. He held the warrant at that time, and the entry and survey were afterwards made in his name.

The estate of Price being greatly embarrassed with debts, certain creditors of his, in the year 1821, filed in the superior court of Virginia their bill in chancery praying a sale of these lands in the State of Ohio, for the purpose of paying the debts of the estate. The administrator, widow, and heirs of Price were made parties defendant. One of these heirs, Wm. D. Price, had, at that time, arrived at majority; the others were minors. Such proceedings were afterwards had that, in November of the same year, a decree by consent for the sale of the lands was taken; the minors consenting by their guardians. At the sale afterwards made in pursuance of the decree, Joseph Carter became the purchaser of the tract in question for the sum of \$1,500; paid the purchase money; and on the 22nd of December, 1853, obtained a patent for the land. In 1827 he conveyed to William Duval, and Duval, *in 1828, conveyed [392 to Samuel and David Dunn, who died, leaving the defendant, Julia, now intermarried with William F. Johnston, their sole heir at law.

Upon this state of the facts, it is claimed for the complainants that they were the equitable owners of this tract of land, and that the judicial proceedings in Virginia resulting in its sale are void, and have in no way affected their interests, and consequently they have a right to demand the legal title from Johnston and wife.

For them it is denied that the complainants ever had an equitable title to this property; and it is insisted that the entry and survey made after the death of Means in his name are absolute nullities; but, in any event, it is further claimed, that the ancestors of the defendant, Julia, must be regarded as innocent purchasers without notice, and protected as such. To this, it is replied, that, even if the entry was void, she can not take advantage of it, as she claims under the same entry, and procured the legal title by virtue of it; and that her ancestors were not purchasers without notice, as the patent refers to the void judicial proceedings by which the warrant was assigned.

That the decree of the Virginia court was entirely inoperative to transfer or affect any interest, either legal or equitable, that the complainants had to lands lying in Ohio, is a proposition too clear for argument. *Salmon v. Price*, 13 Ohio, 368. *Lessee of Blake v. Davis*, 20 Ohio, 231.

On the other hand, it is equally clear that the holder of a warrant, before location or entry, has no such specific equity to any particular tract of land as a court can notice or enforce. As stated

by Chief Justice Marshall, in *Hoofnagle v. Anderson*, 7 Wheat. 217: "The entry, and not the warrant, has always been considered as the commencement of title;" and by Chief Justice Hitchcock, in *Lessee of Latham v. Oppy*, 18 Ohio, 110: "The equitable interest of the locator *commences* with the entry, his equity is merged in the legal title when the patent emanates."

393] *These propositions, being undoubted, bring us to the inquiry: Had these complainants, before or at the time the patent issued under which the defendants claim, the *equitable title* to this land? The solution of the question thus stated must depend entirely upon the answer to be given to another, viz.: Did the entry and survey made in the name of Means, after his death, appropriate the land, or was it a nullity?

The complainant's counsel rely upon the proviso in the first section of the act of Congress, of March 2, 1807 (2 U. S. Stat. at Large, 424), to extend the time for locating Virginia military warrants, etc., and insist that it confirms and makes valid all such entries. It reads thus: "Provided, that no locations, as aforesaid, within the above-mentioned tract shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed, and any patent which may nevertheless be obtained for land located contrary to the provisions of this section shall be considered null and void."

It is not doubted by them that, independent of this proviso, such an entry would be void; and I shall therefore confine myself to an examination of such decisions as have involved its construction.

The question in this state was first raised in the case of the Lessee of *Wallace v. Saunders*, 7 Ohio, pt. 1, 174. It was there expressly decided that an entry made in the name of a dead man was void, and not helped by the proviso in the act of 1807. The court say: "It was intended to protect such surveys as were defective, and which might be avoided for irregularity. But it could not have been intended, as we apprehend, for the protection of such surveys as were absolutely void, or, in other words, such surveys as could not, at any time after they were made, be, consistently with law, carried into grants."

This decision was followed and expressly approved in *Lessee of Sullivant v. Weaver*, 10 Ohio, 275, and in *Lessee of Latham v. Oppy*, 18 Ohio, 104.

*One of the earliest cases in the supreme court of the United [394 States, in which the construction of this proviso was drawn in question, is *Jackson v. Clark*, 1 Pet. 628. The question there was whether an entry and survey upon a warrant already satisfied by another location, after the land had passed into the possession of third persons, was protected against a subsequent entry. The court held that it was; and in answer to the argument that the statute did not protect void surveys, Chief Justice Marshall says: "If it be conceded that this proviso was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity." After stating the conclusion of the court to be that the survey, although irregular, "was not an absolute nullity," he adds: "Lands surveyed are as completely *withdrawn* as lands patented from *subsequent location*." "It may be that the defendants may never be able to perfect their title. The land may be yet subject to the disposition of Congress. It is enough for the present case to say that, as we understand the act of Congress, it was not *liable to location* when the plaintiff's entry was made."

In the case of *Galt v. Galloway*, 4 Pet. 333, the question was first raised as to the effect of an entry made in the name of a deceased person; and it was there distinctly ruled that such a location was void, as any other act done in the name of a deceased person must be considered.

Two years after, in the case of *McDonald's Heirs v. Smally*, 6 Pet. 261, the same question was presented and decided in the same way, and the authority of *Galt v. Galloway* expressly confirmed. At the same term of the court, in the case of *Lindsey v. The Lessee of Miller*, 6 Pet. 666, it was held that the proviso in the act of 1807 did not protect void surveys. The court say: "There can be no doubt that Congress did not intend to protect surveys which had been irregularly made, and it is equally clear that they did not design to sanction void surveys."

*The complainants' counsel say they are free to admit that [395 the doctrine that an entry and survey in the name of a dead man is a nullity, was for a long time countenanced by the supreme court of the United States, and followed by the courts of Ohio; but they insist that the old cases on that subject have been silently overruled by later decisions of the same court. To prove this, they refer to

Galloway v. Finley, 12 Pet. 264, and McArthur's Heirs v. Dunn's Heirs, 7 How. 262.

The first of these cases was a bill in chancery brought by the vendee to rescind a contract of purchase with the vendors, who were heirs of Charles Bradford, the holder of a warrant for military lands, upon the ground that the vendors had no title; the entry and survey having been made, and the patent issued in the name of Bradford, after his death. It also appeared that after the vendee had discovered this defect in the title of the vendors he had entered and surveyed the lands and obtained a patent. Two questions arose: 1st. The rights and obligations of the parties growing out of the relation in which they stood as vendor and vendee; 2d. The effect of the proviso upon the patents of each of the parties.

Upon the first point the court held that vendor and vendee stand in the relation of landlord and tenant, in which the latter can not disavow the title of the former; and when the vendor has been guilty of no fraud, all acts done by the vendee to perfect the title, when in possession of the land, inure to the benefit of him under whom the possession was obtained, and through whom the knowledge that a defect in the title existed was derived; the vendee having only the right to be reimbursed the expenditure. That it was sufficient if the vendors could make title when the last payment fell due; and while a court of chancery would enjoin the payment of the purchase money until the ability to comply with the agreement for title was shown; yet it would give a reasonable time to procure the title, if it appeared probable, on reference, that 396] it might be procured. And inasmuch as the act of 1836 had expressly confirmed to the heirs *patents* issued in the name of deceased persons, it appeared at the time of the hearing (1838) that the defendants had title.

The conclusion of the court upon the second point, after deciding that the statute includes void as well as irregular surveys, is thus stated: "Congress had the power in 1807 to *withhold from location* any portion of the military lands; and having done so, in regard to that previously patented in the name of Charles Bradford, the complainant, Galloway, had no right to enter the same. His location being void, it follows, the act of 20th May, 1836, vested the title to a moiety in the defendant, Finley, exempted from any influence of the entries."

In the case of McArthur's Heirs v. Dunn's Heirs, the complain-

ant's title was derived through an entry made in the name of Means, who was dead, in 1822, a survey in 1823, and a patent issued in January, 1825. The defendants claimed title by an entry and survey made in 1824, and a patent issued in April, 1825. They insisted that the previous entry and survey in the name of Means was void, *and the lands still open to subsequent location*. The court overruled this position, and held that the subsequent conflicting entry came within the prohibition of the statute, and was therefore void. But we can see nothing in the decision itself, or the opinion by which it is supported, calculated or designed to question, much less to overrule the previous decisions, by which it had been settled that an entry in the name of a deceased person was void. On the contrary, the cases of *Galt v. Galloway*, and *McDonald's Heirs v. Smally*, are referred to as express and decisive upon that point. But the judge very justly remarks that that question was by no means decisive of the question before the court; if, indeed, it was at all applicable—"that question not involving simply the validity of an entry made in the name of a dead man, *but embracing the legality of locations made since the enactment of the proviso upon lands previously patented or surveyed, without reference to the circumstance of the death or life of those in whose names such previous patents may have been granted or surveys* [397 made."

And he proceeds further to say, that the natural and common meaning of the terms of the proviso "extend to and protect alike patents, entries, and surveys, of either description, *so far as this end is accomplished by preventing the possibility of conflict with locations and patents coming into existence after its date.*"

On the whole, we are of opinion, that all the decisions may be reconciled, and the obvious import of the proviso maintained, by holding that every *bona fide* attempt to locate lands under a warrant by entry and survey has the effect to *withdraw* such lands from subsequent location upon another warrant, whether such entry and survey is valid or void; but if void, no title or interest, either legal or equitable, passes out of the United States. The whole remains in the government as it did before the attempt was made; but it has the effect, and this only, to exclude every person except the legal holder of the warrant from encroaching upon the land, thus attempted to be appropriated, by subsequent locations. This, in effect, establishes a pre-emption right in favor of such person;

and he may afterwards, while the title remains in the government, acquire a *specific equity* by a valid location, and the legal title by patent.

To enable the government or any individual to grant any title or interest, either legal or equitable, the person designated in the conveyance must be *in esse* to take. The one can not lose the title or interest until the other takes it; which is impossible when the grantee is dead. We do not doubt the power of Congress to provide that such a conveyance shall inure to the benefit of the heir, as it has done in respect to patents by the act of 1836. But we can find no warrant, either in the act itself, or in the judicial expositions of it, for placing such a construction upon the proviso in the act of 1807. That such was not the understanding of Congress, is most manifest from the fact, that with the knowledge which they must be presumed to have had, that the courts were construing 898] it differently, they have again and again renewed and extended it without altering any of its provisions; and from the further fact, that the act of 1836, in respect to patents, would have been useless and unmeaning if the same object had been effected by that of 1807.

The application of these principles to the case in hand brings us to these conclusions: Means died the owner of a warrant which gave him a right to 1,000 acres of land in the military district, but before entry created no specific equity to any particular tract. This right was devised to his executor in trust, and upon the partition it went to the heirs of Price. The attempted location in the name of Means, after his death, being void, did not appropriate the land in controversy, or create any specific equity to it; and the attempted sale of the interest of Price's heirs being also a nullity, has not affected that interest. The right remains in the hands of their heirs exactly as at the death of Means. The government has improvidently issued a patent for this land, and have thus appropriated it; but the complainants have no right to call for the legal title thus acquired.

But it is insisted by the complainant's counsel that the defendants should not be permitted to question the legality of the entry and survey, and the case of *Galloway v. Finley* is claimed to be conclusive upon this point. That case, as we have seen, is placed distinctly upon the ground that the relation of vendor and vendee, equivalent to that of landlord and tenant, existed between the par-

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ties. Does any such relation exist here? If so, as a matter of course, both parties are bound, or neither. If both are bound, what is the position occupied by the complainants? The land was sold and a full and fair consideration paid for it, which has gone to relieve the estate of their ancestor, and not one dollar of it has ever been refunded. With the sale confirmed, they would make a very poor showing in a court of equity. But the whole foundation upon which the bill rests involves an utter repudiation of all connection between the parties founded upon contract. As the counsel say in another part *of their argument, the proceeding throughout [399] as against the infant heirs was *in invitum*. They ask us to declare it a nullity to all intents and purposes, and we have done so. After we have thus set them free, we can not consent to bind the defendants.

The answer of Marshall, C. J., to a similar claim, in *Blight's Lessee v. Rochester*, 7 Wheat. 549, is in point and unanswerable. He says: "If he holds under an adversary title, his right to contest that of Dunlap is admitted. If he claims under a sale from Dunlap, and Dunlap himself is compelled to aver that he does, then the plaintiffs themselves assert a title against their contract. Unless they show that it was conditional, and that the condition is broken, they can not, in the very act of disregarding it themselves, insist that it binds the defendant in good faith to acknowledge a title which has no real existence."

Having arrived at the conclusion that the complainants never had an equitable title to the lands in controversy, which a court of equity could enforce, and that the defendants are under no disability to show the fact, it becomes unnecessary to express an opinion upon the other points of defense relied upon by them. The bill must be dismissed.

Bill dismissed.

THURMAN, J., did not sit in this case.

THE STATE OF OHIO v. STEPHEN CRIPPEN AND OTHERS.

A recognizance, which is an obligation of record entered into before some court of record or magistrate duly authorized, subject to a condition to do some particular act, is invalid unless it contain all the essential parts both

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of the obligation and the condition; and none of the material parts of either can be supplied by oral testimony.

The third section of the act of February 25, 1848, providing that "it shall not be necessary to enter upon the journal of the court any recognizance which shall be taken during the session of the same; but that every such recognizance shall be deemed valid in law, if taken in open court, and attested by 400] *the clerk of such court," does not dispense with a writing setting forth the essential requisites of a recognizance.

A mere memorandum of the clerk of the court, on a loose sheet of paper, setting forth that a recognizance had been entered into in open court by the parties thereto, but not setting out all the material parts, is invalid as a recognizance.

WRIT of error to the district court in Huron county.

The original action was debt instituted in the court of common pleas of said county, on the 7th day of March, 1851, on a recognizance in the sum of five hundred dollars, entered into before the common pleas at the September term, 1850, by Edwin Harvey, Thomas Harvey, and Stephen Crippen, conditioned for the appearance of Edwin Harvey to answer to an indictment at the next term of the court. It appears that Edwin Harvey, being indicted for passing counterfeit coin, was tried at the February term, 1851; but before judgment he escaped, and a forfeiture of his recognizance was taken.

An issue was joined on the plea of *nul tiel record*, and judgment rendered in the court of common pleas in favor of the plaintiff for the amount of the recognizance; from which the defendants appealed. The cause was tried in the district court at the August term, 1852, and judgment rendered in favor of the defendants.

It appears, from a bill of exceptions taken on behalf of the plaintiff, on the trial in the district court, that to sustain the action an instrument of writing upon a loose sheet of paper was offered in evidence as the recognizance taken in the court of common pleas, on which the suit had been brought, which is as follows, to wit:

"The State of Ohio v. Edwin Harvey. Indictment for passing counterfeit coin. Defendant's recognizance in \$500, with Stephen Crippen and Thomas Harvey, his sureties, conditioned for appearance of defendant at the next term of this court to answer the above indictment. Done in open court, September 20, 1850. G. S. Tombling, deputy clerk."

It also appears, from the bill of exceptions, that the clerk of the 401] common pleas, at the time the recognizance was taken, *was

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introduced as a witness on behalf of the plaintiff, and testified that the oral acknowledgment of the defendant in the indictment and the sureties, was taken in open court in the usual form at the time the recognizance was entered into. The journal entry of the forfeiture of the recognizance, made in the usual form, where the recognizance is full and complete, was also given in evidence. The plaintiff, having rested the case on this evidence, the court overruled the evidence as insufficient to show the existence of a valid recognizance, and gave judgment for the defendants. To reverse this judgment, the writ of error is prosecuted.

J. R. Osborne, for plaintiff.

E. R. Sadler, for defendants.

BARTLEY, C. J. The assignments of error present two questions in this case :

1. Whether the instrument, or writing on a loose piece of paper, as set forth in the bill of exceptions, is of itself a sufficient and valid recognizance.
2. If not, whether this memorandum of the clerk, aided by the clerk's oral testimony, and the journal entry of a forfeiture of the supposed recognizance, furnishes sufficient evidence of the existence of a valid recognizance.

A recognizance is an obligation of record entered into before some court of record, or magistrate duly authorized, conditioned for the performance of some particular act. It is equal in solemnity to, and in some respects at common law takes a priority over, an ordinary bond. A recognizance differs from a bond in this, that while the latter, which is attested by the signature and seal of the obligor, creates a fresh or new obligation, the former is an acknowledgment on record of an already existing debt, with condition to be void on the performance of the thing stipulated, and attested by the record of the court alone, and not by the obligor's seal and signature. To be a recognizance, it is essential not only that the instrument be in writing, but also that it be a matter of record. If not actually entered upon the journals or record [402 books, it must be upon the files of the court. It was settled in the case of *Dillingham v. The United States*, 2 Wash. C. C. 422, that it is essential to the validity of a recognizance that the material parts of the obligation and the condition should be set forth in the body of it.

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What does the writing offered in evidence on behalf of the plaintiff in this case, as a recognizance, amount to? It is a brief memorandum of the clerk, relating to the subject-matter of a recognizance. It contains neither the form nor the substance of a recognizance in itself. Neither the name of the cognizee, nor any acknowledgment of any obligation, promise or undertaking on the part of the cognizors is set out. Upon the principle, therefore, that a recognizance must contain, and express in the body of it, the material parts of the obligation and the condition, this paper can have no validity as a recognizance: and this deficiency in the instrument could not be aided by the oral testimony of the clerk, or any entry upon the journal of the court in taking the forfeiture.

On behalf of the plaintiff, it is insisted that the informality and deficiency of the instrument as a recognizance is remedied by the provision in the 3d section of the statute of 25th February, 1848, which is in the following language, to-wit:

"It shall not be necessary to enter upon the journal of the court any recognizance which shall be taken during the session of the same; but every such recognizance shall be deemed valid in law, if taken in open court and attested by the clerk of such court."

This law dispenses with the entry of the recognizance upon the journal of the court; but it does not dispense with the necessity of reducing the recognizance to writing. If not reduced to writing and filed, it could not be an obligation of record. A parol obligation must bear some other name. The plea of *nul tiel record*, which is always a proper plea to a declaration in debt on a recognizance, would be unavailable against a declaration on a parol undertaking. 403] *The object of this provision of the statute was obviously to relieve the clerks of the courts during the pressure of the business of a session, by allowing them to use blank recognizances, which, when taken and filled up in open court, attested by the clerk, and filed, should be sufficient, without the entry of the same upon the journal.

Judgment affirmed.

ELIZABETH BENADUM, BY HER NEXT FRIEND, ETC. v. JAMES R. PRATT AND ANOTHER.

A wife who, by gross abuse of her husband has been driven beyond the pale of his protection, and a separation *de facto* exists, she living and maintain-

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ing herself as a single woman, and having had specific property decreed to her as alimony, may maintain an action at law in regard to such property, without the joinder of her husband, although no divorce has been decreed.

ASSUMPSIT, reserved in the district court of Fairfield county.

The declaration is upon the common counts. The defendants plead that, at the time of the issuing of the writ, the plaintiff was under coverture of Jacob Benadum, her husband, who was still living, etc.

The plaintiff replies that, at the time of the marriage, the plaintiff was seized, as of an estate for life, of a certain eighty acres of land therein described. That, on account of the gross abuse of her husband, she separated from him, and filed her petition against him and others, in the court of common pleas of Fairfield county, charging such abuse, and praying to have alimony decreed to her; and upon hearing of the petition, in March, 1846, the tract of land was, by order of said court, by consent of the parties, set apart and assigned to her, and possessed, occupied, and enjoyed thereafter by her, for her sole use and benefit. That she has continued to live separate and apart from her said husband; and, since April 1, 1851, she has been in the exclusive possession of said premises. That, in July, 1851, a crop of wheat was cut and harvested *on [404 said premises, which was claimed by her to be her property, and by the defendants to be their property. That afterward, on the 25th day of July, 1851, plaintiff and defendants entered into a written agreement, by which it was provided that defendants should take and use the wheat, and should thereafter pay the plaintiff its value, if it was hers in law. That defendants did take and use the wheat; and this suit is brought to recover its value. To this replication there is a general demurrer, which was sustained by the court of common pleas, and judgment rendered for defendants. The cause having been brought into the district court, by appeal, is reserved for decision here.

Hunter & Martin, for defendants.

J. T. Brazee, contra.

CORWIN, J. The only question presented for our consideration is whether, under the circumstances set up in the replication, the plaintiff, by her next friend, and without the joinder of her hus-

band, can maintain an action at law with respect to property decreed to her separate use and enjoyment?

It is remarkable that upon a question so frequently arising, and of so general interest and importance, involving, as it does, a consideration of the relative rights and liabilities of the parties to this, one of the principal private relations, the common law rule, in case of a separation *de facto*, has at different times been so differently understood and declared by the courts of England. In 1786, Lord Mansfield, in pronouncing the unanimous opinion of the court of King's Bench, held that a married woman, living separate and apart from her husband, under a settlement by which a competent maintenance was secured to her, was liable, as a *feme sole*, for debts incurred by her. And, in numerous adjudged cases, collected in 1 Salk., tit. Baron and Femme, it was held that a married woman was liable as a *feme sole*, when she lived separate and apart from her husband, and had a competent separate maintenance, regularly paid, and when the goods were furnished for her separate use and support.

405] In *Todd v. Stokes, Lord Chief Justice Holt observed: "If Baron and Femme separated by consent, and she has a separate allowance, it is unreasonable that she should have it still in her power to charge him." But for a series of years thereafter, the rule thus established, by so high authority, was gradually encroached upon by the court of King's Bench, under the administration of Lord Kenyon, until, in the case of Marshall v. Bretton, 8 Term, 545, it was decided that a plea in abatement of coverture at the time when the debt accrued, was a sufficient answer to the action. And it is now well settled in England, that while the marriage subsists in law, a separation *de facto*, however solemnly made and strictly enforced by contract between the parties, although an adequate fund is secured for her maintenance and support, the parties remaining in the realm, the wife can neither sue in her own name, nor be sued, for debts owing to or incurred by her; but that in all such cases a remedy must be had by resort to the powers of the court of chancery over trust funds. In Lewis v. Lee, 3 Barn. & Cres. 291, it was decided that coverture was a good plea, notwithstanding a divorce *a mensa et thoro*. But, although it thus appears to be the policy of the English courts, at this time, that rights and liabilities of this description should be specially cognizable in courts of equity, yet the more liberal and reasonable rule of Lord

Mansfield and Chief Justice Holt seems to have obtained in this country. A learned American commentator says: "I should apprehend that the wife could sue and be sued without her husband, when the separation between the husband and wife was by the act of the law, and that takes place not only in the case of a divorce *a mensa et thoro*, but also in the case of imprisonment of the husband as a punishment for crimes. Such a separation may, in this respect, be equivalent to transportation for a limited time, and the sentence which suspended the marital power suspends the disability of the wife to act for herself, because she can not have the authority of her husband, and is necessarily deprived of his protection." 2 Kent's Com. 136. And this doctrine is adopted in *Dean v. Richmond*, 5 Pick. 461; *Pierce v. Burnham*, 4 Metc. *303, and [406 in *Lefevre's Lessee v. Murdock*, Wright, 205. In *Gregory v. Paul*, 15 Mass. 31, it was held, that although the marriage relation still subsisted, "when the husband had deserted the wife in a foreign country, and she had thereafter maintained herself as a single woman and for five years had lived in that commonwealth, the husband being a foreigner, and never having been within the United States, she was competent to sue and be sued as a *feme sole*; and her release would be a valid discharge for any judgment she might recover."

In *Abbott v. Bayley*, 6 Pick. 89, the husband, by his cruelty, had driven his wife from his house, without providing her any means of support. The wife went to Massachusetts, and for twenty years maintained herself as a single woman, the husband having remained a citizen of, and resident in, another of the United States, and having married another woman, it was held that she was entitled to sue as a *feme sole*. And it is established by well adjudicated cases in the courts of different states of this Union, that not only where the marriage relation is suspended by act of law, but where the husband is a foreigner, residing permanently abroad, or where by his cruelty a separation is forced, and the wife removes to another one of the United States and maintains herself as a single woman; in either of these cases, whether the wife have, or have not, a separate allowance, she is entitled to sue and be sued as a *feme sole*. And this right extends to whatever contract she may make, and to whatever property or interest she may have.

But in the case under consideration there has been no suspension of the marriage relation by act of law—there is no residence

abroad—the parties continue to reside in the State of Ohio. The wife has been compelled, by the gross abuse of her husband, to separate herself from him—she has not chosen to seek a divorce *a vinculo matrimonii*—a divorce *a mensa* is not now provided by the laws of Ohio. By a decree of one of the courts of this state, a specific property is assigned to her as alimony—she is possessed of the property, and continues to live and maintain herself as a 407] single *woman. May she not sue those who trespass upon her lands, or the tenant who withholds her rents, or for the proceeds of her alimony? If she must join her husband in an action, he may release it; he may receive her rents, and discharge her tenants, and thus effectually defeat the means of support provided by the decree of alimony. It is replied, that she may have relief in a court of equity; and it is true that she may there obtain a remedy, not only in the exercise of common chancery powers, but by express legislative enactment of our state. But we are not disposed to drive her out of a court of law, and oblige her to seek relief in another action, and in another forum, unless some valid objection exists to her recovery at law. The tendency of our legislation, for the last quarter of a century, has been to enlarge and extend the rules by which the legal rights of married women shall be determined and protected; and being satisfied that this legislation is demanded by the well-being of society, that it is founded in a humane, liberal, and enlightened policy, we are unwilling to adopt any unmeaning and unreasonable distinction, which will defeat its full operation in its true intent and spirit. And especially at this period of our history, when the days of distinction between law and equity are almost numbered, are we unwilling, in the absence of any good reason requiring us to do so, to compel the party to seek elsewhere, with increased expense, delay and vexation, an admitted right, given to her by the laws of the land.

All of the cases, ancient and modern, where the right of the wife to sue and be sued alone is denied, go upon the ground that the right of the husband to the custody of the person of the wife, and the right of the wife to the protection of her husband, still continue. But it is settled by respectable decisions in this country, that where there is a separation *de facto*, and the husband has not the actual custody and control of, and does not extend protection over the wife, and a separate allowance has been decreed to her, although the marriage relation still nominally subsists, the husband is not liable

upon her contracts. *Burnett v. O'Fallon*, 2 Miss. 69. She may maintain an action at law to secure and protect *the al- [408] lowance thus decreed to her. *Prather v. Clarke*, 1 S. C. Const. 453.

What is the true rule in Ohio? If this party can not sue at law to recover rents accruing upon the lands assigned her as alimony, neither can she sue at law to recover for a trespass upon such lands; or if the proceeds of such alimony are carefully saved, and invested in articles of personal property, for the more convenient and profitable enjoyment of the lands, and a trespass is committed upon such personalty, a court of law is impotent for relief, and the wrong is without a remedy; or the trespass, properly cognizable at law in all other cases, must be prosecuted in equity. But we think it a much greater innovation upon established rules to say that recovery shall be had in equity for trespasses, than to say that when a married woman, by the brutality of her husband, has, in fact, been deprived of his care and protection, and compelled to live and maintain herself as a single woman; and when the husband has, in fact, forfeited all claim upon the society of his wife, she may maintain an action to protect what is decreed to her in a proceeding for alimony, as her own separate property. In this case, the husband has forfeited all claim to the custody of the wife, and all right to her separate property; for it will be observed that under the act of March 6, 1840, a petition for alimony alone may be filed only for causes which would justify a petition for divorce; and the pleadings show that alimony was decreed to this plaintiff for one of the causes of divorce enumerated in the statute. The policy of the last named act is not to compel a wife, who may suffer from any one of the causes of divorce, to seek a divorce *a vinculo*; but contemplating a case of actual separation, when the wife is, to all intents and purposes, deprived of the care and protection of her husband; when she is obliged to live separate and apart from him, and maintain herself as a single woman, provides expressly for her alimony, in her separate and single condition. The several acts of February 28, 44 Ohio L. 75, and of February 5, 1847; 45 Ohio L. 23, contain an express declaration of legislative intention that no interest of the wife in either real or *personal estate, should [409] be liable to be taken upon the contracts of the husband, during the life of the wife, or during the life or lives of her child or children; and further provision is made, enabling the wife by injunction to restrain her husband or others from wasting or squandering her

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property. We think that a denial of the right of a married woman to sue for the protection of her own separate property, in which the husband has no interest, and when his brutality has driven her beyond the pale of his protection, would not only be at war with the spirit of our legislation for the protection of the rights of married women, but would tend very strongly to defeat, and in many cases would entirely defeat its object; and, instead of being in the advance, in the extension and enlargement of our rules of practice, so as to adapt them to the actual wants and necessities of society, as it exists, we would be sadly behind our sister states, the decisions of whose courts have been referred to. In the opinion of a majority of the court, there is no good reason to sustain this demurrer; the facts pleaded in the replication are sufficient to sustain the action, and the demurrer is therefore overruled, and the cause remanded to the district court for further proceedings.

RANNEY, J., dissented.

GEORGE H. BUSBY AND ANOTHER *v.* JOHN R. FINN, TRUSTEE OF
THE LATE STOCKHOLDERS OF THE BANK OF NORWALK.

To make a paper a part of a bill of exceptions it must be incorporated in it, or attached to it, or filed with it, and so described as to leave no doubt of its identity. When not so made a part of the bill the defect is not cured by a journal entry directing it to be taken as a part thereof.

A bill of exceptions must be signed and sealed at the term at which the exception is taken, and it can not be amended after that term. A *nunc pro tunc* order made at a subsequent term to the effect that a paper not identified by the bill shall be considered as a part of it is a nullity.

The Bank of Norwalk was restricted by its charter to six per centum per annum, in advance upon its loans; any contract upon which it knowingly took interest at a greater rate was void; it had no right to take interest [410] *under the name of attorney's fees for collection, and a mistake of law upon its part would not exempt it from the consequences of taking illegal interest.

But an error in calculation, an accidental omission of a credit, or a transfer by mistake of an item from one account to another, will not make a security usurious and void, there being no intent to exact or take unlawful interest.

A contract untainted with usury when made, will not become void by a subsequent receipt of usurious interest upon it.

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A judgment upon an usurious contract can not be collaterally impeached, and when made the consideration for another contract, such consideration is not void. So long as the judgment stands it estops the parties to deny the legality of the consideration.

When a debtor voluntarily pays the collection fees of the creditor's attorney, and no part of them is retained by the creditor, but they all go to the attorney, and the transaction is not a shift to obtain usurious interest, a note subsequently given by a surety of the debtor for a balance of the debt remaining due, is not void for usury.

If a debtor make an assignment to pay debts, some of which are usurious, no beneficiary of the trust who comes in under it, can object to the payment of such usurious debts.

ERROR to the common pleas reserved in the district court in Huron county.

Watson, for plaintiff in error.

Worcester, Pennewell & Lane, for defendant in error.

THURMAN, J. This is a writ of error to the Huron common pleas, reserved for decision here. The original action was assumpsit, the declaration containing a count on a promissory note made by the plaintiffs in error and one Ronse to the Bank of Norwalk and the common counts. Plea, the general issue, with notice of special matter in bar. The cause was submitted to the court, who found for Finn, the plaintiff below, and after overruling a motion for a new trial made by Busby and Welsh, gave judgment; to reverse which this writ is prosecuted. The errors assigned are, in substance, that the claim on which the court rendered judgment was usurious and void. On the trial a bill of exceptions was taken, which is in these words:

"John R. Finn, Trustee of the late stockholders of the Bank of Norwalk *v.* George H. Busby and Madison W. Welsh. *Be [411 it remembered, that at the trial of this cause at the March term, A. D., 1849, of said court, the plaintiff to maintain the issue gave in evidence the cognovit and proof of notice and rested. Thereupon the defendants gave in evidence the record of the judgment in Marion county, hereto attached, marked A, and also the statement of Mr. Finn, marked B, and rested. The plaintiff, the testimony of C. D. Boalt, hereto attached, marked C. The record from Wood county, marked D. The record of suit at law in Marion county, marked E, and the record of chancery case from Marion county, marked F. Upon which testimony the court found that the de-

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defendant did assume and promise, and assessed the plaintiff's damages at \$2,624.26. Thereupon the defendant made his motion for a new trial, for the reasons therein assigned, which motion the court overruled. To which rulings and findings of the court the defendants excepted, and prayed the court to sign and seal this their bill of exceptions, which is accordingly done, and on their motion the same is made a part of the record in this case.

"E. B. SADLER, President Judge, [SEAL.]

"F. SEARS, [SEAL.]

"F. WICKHAM, [SEAL.]

"E. STEWART, [SEAL.]"

Among the papers before us are certain papers marked, respectively, A, B, C, D, E, F, and H, but neither of them is, in any way, attached to the bill of exceptions, nor does either of them bear any file mark of any court, nor are they, or either of them, referred to in the pleadings, or verified, or even alluded to in any return, or certificate, of the clerk of the common pleas—in a word, we have nothing whatever from which we can properly take notice that these papers are the same papers mentioned in the bill of exceptions. We do not mean to say that it is indispensable to copy into, or actually attach to, a bill of exceptions, every paper making part of it, though *Hicks v. Person*, 19 Ohio, 446, seems to require this. 412] Such a description may be given of an exhibit as to *leave no doubt of its identity when found among the papers; but, on the other hand, the description may be so loose, that of a number of papers each one will satisfy it just as well as any other. Thus, in the present case, the bill states that "the defendants gave in evidence the record of the judgment in Marion county hereto attached, marked A," but no such record is attached, or marked as filed, or mentioned in the pleadings, or referred to in any return or certificate of the clerk of the court. It is therefore manifest, that *any* record of *any* judgment of *any* court in Marion county, and between *any* parties, satisfies the description in the bill of exceptions, provided it is marked A. The same thing may be said of the other exhibits. *Any* statement of Mr. Finn, marked B; *any* testimony of C. D. Boalt, marked C; *any* record from Wood county, marked D; *any* record of *any* law-suit in Marion county, marked E; or *any* record of *any* chancery case in that county, marked F, will

come within the description in the bill of exceptions; and one just as well as another.

In *Hicks v. Person*, above cited, the exhibits, which it was intended should form parts of the bill, were referred to just as in the present case, and were, save one, among the papers of the case in error; but the court held that they could not be regarded as parts of the bill.

The chief justice, delivering the opinion of the court, said: "Before this court can determine whether a verdict in the court of common pleas is against evidence, we must have not a part only, but the whole evidence which was before the jury, on the trial, and this must be brought before us by a bill of exceptions, made part of the record. I say made part of the record. For it is only upon inspection of the record that a court of errors acts. All the evidence before the jury must be embodied in or made part of the bill of exceptions. It will not do, as is sometimes attempted to be done, to refer to the records of courts, or records of deeds, an attempt to make them parts of bills of exceptions. It will not do to refer to depositions on file by the names of the deponents, [413] or by artificial marks upon the depositions themselves, without something beyond this. They must be attached to or made part of the bill of exceptions, so that when a record of the case shall be made, they can be introduced into that record as constituting a part of the case. Such preparation of bills of exceptions may be attended with much labor on the part of counsel, and with much expense on the part of clients, and probably the labor and expense will be avoided, except where there is palpable ground for the belief that wrong and injustice have been done. This strictness is not required where the motion for a new trial is based upon an error committed by the court in the progress of the trial, but only where the complaint is that the verdict was against evidence. In such case we must have all the evidence before us."

So in *Wells v. Martin & Co.*, decided at the present term, we held that a deposition was not sufficiently made a part of the bill of exceptions by a reference to it which merely stated the deponent's name.

As to the paper marked H, which purports to be a copy of a cognovit, we see no pretense for calling it a part of the bill. The bill simply states that the plaintiff below "gave in evidence the cognovit and proof of notice, and rested." What cognovit? 'The

pleadings say nothing of such an instrument, and the bill does not refer to it by even an artificial mark, or speak of it as on file, or give its date, or say who were the parties to it. This defect in the bill seems to have been subsequently discovered; for, after the present writ of error had been sued out and was pending in the court in bank, Busby & Welsh, at October term, 1851, of Huron common pleas, procured the latter court to make the following order:

"October term, 1851—to wit, October 24, 1851.

"Assumpsit. John R. Finn, trustee of the late stockholders of the Bank of Norwalk, v. George H. Busby and Madison W. Welsh. 414] *"Huron common pleas. Judgment rendered at the March term, A. D. 1849, and taken to the supreme court on error, and reserved for decision in the court in bank."

"On motion to the court, and it appearing that this court, in signing the bill of exceptions in said case, intended to make the cognovit filed in said case described in the declaration, and now remaining among the papers in the same, and marked H, a part of said bill of exceptions at the time the said bill of exceptions was signed and allowed. It is therefore ordered that said cognovit be hereby made a part of said bill of exceptions in the above entitled case, and that this order be entered as of the said March term, A. D. 1849, of this court, and certified to the court in bank as a part of said bill of exceptions."

This is certainly a curiosity in the history of judicial proceedings. The statute requires a bill of exceptions to be signed and sealed at the term at which the exception is taken, and it can not be done afterward. 43 Ohio L. 80; *Hicks v. Person*, 19 Ohio, 426. But if the plan here attempted is permissible, signing and sealing are unnecessary, and a mere journal entry will answer for a bill of exceptions, and instead of the bill being perfected at the term in which the exception is taken, as is required by the statute, it may be completed at any subsequent term, even after the original papers are in the court of errors, by a *nunc pro tunc* order, and that made by different judges from those who signed and sealed the bill. Such a proceeding is wholly unauthorized and the order in question is a nullity. And here we may remark, as showing how improvidently the order was granted, that it speaks of the cognovit as an instrument "described in the declaration," when in truth the declaration makes no mention whatever of it.

It is clear, then, that we can not look at the paper marked H, and consequently we have nothing before us to show the contents of the cognovit mentioned in the bill of exceptions. In other words, we have not all the evidence given on the trial in the common pleas, if, indeed, we have any of it, in a *form that we [415] can notice it. And here it is to be observed that the cognovit was a very material piece of testimony; for upon it, with proof of notice, the plaintiff below rested in chief, and no question appears to have been made but that he had thereby established, *prima facie*, a right to recover.

The errors assigned amount in substance to this only, that the finding of the court was against the evidence. But as the evidence is not properly before us we can not say that the finding was erroneous.

We may add, however, that if the exhibits in question were all sufficiently made parts of the bill of exceptions, we should yet affirm the judgment of the common pleas. For we are unanimously of opinion that the claim upon which it was rendered was not void.

It is, perhaps, unnecessary for us to give, in detail, the reasons that bring us to this conclusion. There is not, so far as we see, a controverted question of law in the case, and it can seldom be of use to report decisions upon mere questions of fact, which, however interesting to the parties, are of no moment to the public, and furnish no precedents to the courts or the bar. That the bank of Norwalk was restricted by its charter to six per cent. per annum, in advance, upon its loans; that any contract upon which it knowingly took interest at a greater rate was void; that it had no right to take interest under the name of attorney's fees for collection; that a mistake of law upon its part would not exempt it from the consequences of a taking of illegal interest, are propositions that can not be, and are not, gainsaid. On the other hand, it will not be pretended that an error in calculation, an accidental omission of credit, or a transfer, by mistake, of an item from one account to another, will make a security usurious and void, there being no intent to exact or take unlawful interest. And it is equally well settled that a contract untainted by usury when made, will not become void by a subsequent receipt of usurious interest upon it. "There are two cardinal rules in the doctrine of usury," (said Mr. Justice Thompson, *Nichols v. Pearson*, 7 Pet. 109), "which we think must be regarded as the common *place to which all [416]

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reasoning and adjudication upon the subject should be referred. The first is, that to constitute usury there must be a loan in contemplation by the parties; and the second, that a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction."

Now, in the case under consideration, it is not pretended that the debt originally due the bank was tainted by usury. The material facts are, that on December 1, 1836, one Alvin C. Priest procured a note for \$8,000, made by himself, and Welsh, Bowen, and Busby, as his sureties, and payable at six months, to be discounted by the bank. No attempt was made to reserve interest at a greater rate than six per cent. per annum. Indeed, owing to a mistake, less than that rate was reserved. In January, 1837, he executed two mortgages, one of land in Marion, and the other of land in Wood county, to C. D. Boalt, as trustee for the bank and his said sureties, to secure payment of said note, and of another note for \$300 due the bank; and the Wood county mortgage was also conditioned that he "should pay all costs and charges of what nature soever to which the bank might be subjected in collecting said debts." The note matured June 4, 1837, and was not paid, but shortly afterwards Priest made some payments upon it. In September following it was placed in the hands of Boalt, a lawyer, for collection. On the 19th of that month he took, as a collateral security, Priest's cognovit for \$5,650.27. This sum consisted of the balance then computed to be due on said \$8,000 note, together with \$3.20, a balance of an old account due by Priest, and \$137.80, being two and a half per cent. attorney's fees for collection. In computing the amount due on the note, several errors in the calculation of interest accidentally occurred, resulting in an excess of \$1.72 in favor of the bank.

On February 26, 1838, judgment was entered on this cognovit. On the next day Bowen, Busby, and Welsh, gave their cognovit, as collateral, for the amount of the judgment, upon which latter cognovit judgment was entered against them, *May 21, 1838. On February 27, 1838, Boalt filed a bill of foreclosure on the Marion county mortgage, and in September following obtained a decree, under which \$2,922 were subsequently made. On April 24, 1838, he filed a bill of foreclosure on the Wood county mortgage.

The bill specifically sets forth the judgment of February 26,

1838, against Priest, for \$5,798.52, and that this sum "included the sum of \$137.80, due the said Boalt for prosecuting said claims, and for which said bank is liable to said Boalt, the same being the amount agreed on between said Priest and Boalt, and taxed at the usual rate of two and one-half per cent. on the amount due from said Priest to said bank, for which amount the said bank now holds the cognovit of the indorsers to be entered at the next term of the Marion common pleas."

"That this mortgage was dated January 11, 1837, and was conditioned that Priest should pay the bank said \$8,000 note, and said sum of \$300, and should pay all costs and charges of prosecution, and keep said securities harmless in the premises." And it is further charged in the bill "that the mortgage had become absolute;" "that there remained due the complainant the several sums above set forth, with interest and costs aforesaid, and that said bank has been obliged to, and has incurred charges for collection, in manner above set forth, and agreed as aforesaid to be paid by the said Priest in and by the condition of said mortgage, and fixed in account as aforesaid, and included in said judgment." "That said land was conveyed to said Boalt in trust for the benefit of said bank, and the said Welsh, Busby, and Bowen, for their [indemnity?] individually against said debt." Priest, Welsh, Busby, and Bowen are made parties, "and *full and explicit answers* to all and singular the premises" prayed for.

Answers of Priest and wife, Welsh, Busby, and Bowen were filed June 25th, 1838 (on oath, except Bowen's), and they admit "and say it is true that said Priest is indebted to the bank in the sum of \$5,798.52, debt and damages, together with costs of suit taxed at \$7.12, now in judgment in *the common pleas of Marion [418 county, for which the said Boalt has a lien on the mortgaged premises described in the bill, together with interest."

At the October term of the Wood common pleas (October 18), the cause was referred to Purdy, as special master, who, among other things, reported, first, that the mortgages were severally given by Priest and wife, as set forth in the bill of complainants, and that there was due to complainants on this judgment, secured by their mortgage as set forth in the bill, the sum of \$5,798.52, damages, and \$8.50, costs, and interest from the 26th day of February, 1838, subject to be reduced by any sum paid on said judgment at law in Marion common pleas. This report was confirmed at the

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same term, finding due to the bank, including interest and costs on the judgment in Marion county, the sum of \$6,029.26. A decretal order was accordingly issued, the premises mortgaged offered for sale on the 26th of February, 1839, appraised at \$2,000, and bid in by Bowen, Busby, and Welsh for \$1,334. Sale confirmed March 28, 1839, in Wood common pleas.

Of the proceeds of the sale (\$1,334), \$910.98 were absorbed by prior liens and costs, leaving \$423.02 to be applied to the claim of the bank, for which Boalt, on behalf of the bank, but without receiving the money, gave Busby a receipt, which was used in making payment to the master. In both the Marion and Wood county decrees, the amounts found due include the alleged usurious items, and the amounts are found to be due by Bowen, Busby, and Welsh, as well as by Priest. On April 21, 1839, a settlement was made between Boalt, as attorney as aforesaid, and said sureties, and they gave their note at six months for \$2,883.56, the amount computed to be due at the date of said settlement, and paid the interest for the time the note had to run. This note was renewed six times, until July 15, 1842, when Bowen individually assumed one-third of it, for a portion of which he procured a discount, which, after several renewals, was finally paid January 15, 1844. On the same 419] 15th of July, *Busby and Welsh, with Rouse as their surety, made their note for the other two-thirds, which was discounted by the bank, and several times renewed, until April 13, 1843, when the note on which the suit was brought was made and discounted.

At March term, 1845, of Marion common pleas, the judgment against Bowen, Busby, and Welsh, was set aside, and upon a trial subsequently had, a verdict and judgment were rendered for the defendants, which was affirmed on error in the supreme court.

It appears from Boalt's testimony, that his fees aforesaid, were paid in April, 1839, four years before the note in question was given. There is also reason to believe that in the settlement of 1839, there was an omission to credit Priest with \$75 previously paid by him, but there is no reason to suppose that the omission was designed, or was anything but an accident. It is also shown that the bank had adopted a rule in the following words:

"Where expenses are incurred by the bank, from the non-payment of debts, either in attorney's fees, or otherwise, no person

whose name appears on such paper, will be entitled to credit until such expenses are adjusted. Debts placed in the hands of an attorney for collection will not be withdrawn until his charges are paid ;" but there is nothing to show that this rule was used to exact the fees in question. And it is clearly proved that the fees all went to Boalt. No part of them was reserved by the bank—nor is there any reason to believe that any of the transactions between the parties was a shift or device to obtain usurious interest. How, then, stands the case? Certain errors and omissions occurred in the calculations, but being accidental they did not taint the security with usury—and as to the \$75 credit that was omitted, the money was paid long before the note in question was given. To have obtained the benefit of that credit, it was necessary for the defendants, by a notice attached to their plea, to set up the fact as showing a partial want of consideration. Not having done so, [420 they lost the opportunity to make the deduction.

As to the alleged compounding of interest, by means of the rests made at the several settlements, we find nothing illegal in it. The debt was overdue when the settlements were made, and we are not aware of any law that prevents a creditor and debtor, by mutual agreement, from turning interest that has accrued and become due into principal.

This leaves nothing to be considered but the attorney's fees. Now, although the bank had no right to exact these fees, yet there was nothing immoral in Priest or his sureties agreeing to pay them, especially as Boalt, who was to receive them, had, by taking the mortgages to secure the bank and indemnify the sureties, undertaken a duty for the immediate benefit and protection of the sureties, and which involved him in both labor and expense.

The amount of the fees was agreed upon by Priest and Boalt, and the former confessed judgment for an amount which included them. That judgment has never been set aside, and it is perfectly clear that Priest can not collaterally, if at all, assail it. It estops him to deny that he did not, at the date of the judgment, owe that amount. In *Bearce v. Barston*, 9 Mass. 48, it was held that "where the party liable upon a usurious contract will not avail himself of the remedy provided by the statute for the purpose of avoiding it; where he voluntarily discharges it, or suffers a judgment to be recovered upon it, or makes it the consideration of a contract entirely new, as being with a third person not a party to the original contract, or to

the usury paid or reserved upon it, or as combining other parties and considerations, and not being a contrivance to evade the statute, then the provision no longer applies. Money paid upon a usurious contract is not to be recovered back; a judgment upon a usurious contract is not for that objection to be avoided—and when made the consideration for another contract, it is neither an illegal nor a void consideration."

421] *Now apply these principles to the case at bar. Priest agreed to pay the fees, and confessed a judgment including them. His sureties afterwards gave their cognovit for the amount of the judgment. The calculation indorsed on the cognovit when they executed it shewed that the fees were included. They subsequently gave new notes which were renewed from time to time, after payments made, until the note in question was finally given for the balance remaining due. When this note was given the judgment against them on their cognovit was in full force, and they were then clearly estopped by it to deny, at least in a collateral proceeding, the amount due. Under these circumstances it would, possibly, not be going too far to say, that although that judgment was subsequently set aside, yet as the judgment against Priest remains in force, the makers of the note in question can not impeach it for usury taken before the rendition of the latter judgment. It is unnecessary, however, for us to so decide; for we find that the fees were *paid* by Priest, and as there was nothing immoral or wrong in the payment, as they had been well earned by Boalt, as no part of them was reserved by the bank, and as the transaction was not a shift to obtain illegal interest, we see no right of the plaintiffs in error to complain.

There is another view of the case that is equally conclusive. The mortgages to Boalt were for the benefit of the bank and Priest's sureties. By them Boalt was made a trustee for all the parties, and the Wood county mortgage provided for the payment of the fees. The plaintiffs in error accepted the benefit of this trust. In their answers under oath to the Wood county bill, they admitted the fees to be due, and that they were bound for them. The master so reported, and they made no exception to the report. A decree was rendered accordingly, and they, with Bowen, the other surety, bought the land sold under it and paid to the master the amount ordered to be paid to the bank by a receipt which they obtained from Boalt without having paid the money, thus depriving the bank

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of the security of the land, and leaving *their own personal [422 liability to the bank in lieu of it. In a word, the foreclosure of the Wood county mortgage resulted to their benefit alone. Now it seems to us clear that, having thus availed themselves of the trust created in their favor, they can not be permitted to gainsay the legality of the objects of that trust. It is well settled that if a debtor make an assignment to pay debts, some of which are usurious, no creditor or beneficiary of the trust, who comes in under it, can object to the payment of such usurious debts. So it was expressly ruled in *Pratt v. Adams*, 7 Paige, 615, and in *Green v. Morse*, 4 Barb. 332, and such is undoubtedly the law.

In no aspect in which we can view the case did the common pleas err, and its judgment must, therefore, be affirmed.

Judgment affirmed.

JOHN TURNER v. THE STATE OF OHIO.

Upon the trial of an indictment for robbery, under the 15th section of the crimes act, by putting in fear the prosecuting witness, it is not necessary to show that the property taken was actually severed from his person. It is enough if the property was in his presence and under his immediate control, and he laboring under such fear, the property was taken by the accused with intent to steal or rob.

The terms "personal property," used in the act, are sufficiently comprehensive to include bank notes and other choses in action.

Where the indictment avers an actual stealing of bank notes, the intent to steal named in the statute, is necessarily included as well as the knowledge that they were such.

In such case, if the indictment contains a particular description of the bank notes taken, but erroneously averring them to be "money, good and chattels," these words may be rejected as surplusage, and the count will be good.

ERROR to the district court in Jefferson county. The case appears in the opinion of the court.

Moody, for plaintiff in error: *United States v. Wilterberger*, 5 Wheat. 76; Archb. Crim. Pl. 313; *Rex v. Thompson*, 1 Mood. C. C. 78; *Rex v. Hamilton*, *8 Car. & P. 49; Archb. Crim. P. [423 61; *Id.* 208; *Id.* 306; 2 Hale's Pl. C. 182-3; *Stewart v. Common-*

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wealth, 4 Serg. & R. 194; *Rex v. Fry, Russel & Ry.*, C. C. 482; 1 Mood. C. C. 466.

Pugh, attorney-general, for the state.

RANNEY, J. At the June term, 1852, of the court of common pleas for Jefferson county, the plaintiff in error was indicted, tried, and convicted of the crime of robbery, and sentenced to the penitentiary for the term of five years. This sentence being removed by writ of error, to the district court sitting in the same county, was affirmed; and the present writ is prosecuted to reverse the judgment of the latter court, as well as the judgment affirmed by it. The errors assigned relate to the action of the court upon the trial, in the admission of testimony objected to, and in instructions given to the jury; and to the sufficiency of the indictment.

By the bill of exceptions, it appears that the state gave evidence tending to prove that the prisoner, in the night time, entered the dwelling-house of Robert Morton, named in the indictment, armed with a bowie-knife and sledge-hammer, there being in the house, at the time, said Morton, his wife, and a daughter, and threatened to kill them, and put said Morton in great bodily fear and danger of his life. The prisoner then demanded his money, and ordered him to get up and light a candle and get it. The prosecutor and his wife then went to a secretary in the same room, and his wife took from a drawer the two bank bills named in the first count of the indictment, and, while in the act of handing them to her husband, they were snatched by the prisoner and put in his pocket. He then proceeded to rifle the drawers of the secretary and took therefrom between fifty and sixty dollars in bank bills and coin, and departed. This evidence was objected to upon the ground that it did not tend to show a taking from the person of Robert Morton; but the objection was overruled and the testimony admitted. The court were then requested, by the prisoner's counsel, to charge the jury that, under the Ohio statute, defining robbery, it is necessary 424] *that the state should prove an actual severance from the person, of the property described in the indictment, and that there can be no constructive taking from the person. The court gave this in charge as the law, with this qualification: "In order to consummate the offense, it is not necessary that the property should be actually taken from the person of Robert Morton, the individual named in the indictment. It is enough if the property was in his

presence and under his immediate control, and he was put in fear by the defendant, and while the property was so in his presence, and under his immediate control, and he laboring under such fear, the property was taken by the defendant." It is evident the admission of the testimony and the charge raise the same question; and it is this: "Is an actual severance from the person, of the property taken by violence or putting in fear, an indispensable ingredient in the crime of robbery, as defined by our statute? The statute is in these words: "If any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or personal property of any value whatsoever, with intent to steal or rob, every person so offending shall be deemed guilty of robbery, etc." It is conceded that the circumstances proved would have constituted robbery at the common law; but it is insisted that our statute must receive a narrower construction, and that an actual taking from the person must be proved, to come within its provisions. And this argument is based upon the long established rule, that penal statutes are to be construed strictly, and can not be extended beyond the terms used, to cover cases falling within their spirit, and of equal atrocity. While this rule is recognized as well established and entirely sound in principle, we are not at liberty to disregard another equally well settled; that words are to be understood in the sense in which they are used. If legal words are used, we are to understand them in the recognized legal sense; and so of terms of art or science; the object of all construction being to arrive at the intention of the legislature. In penal statutes, we are not at liberty to depart from the words employed; but [425] we are bound to ascertain the fair meaning of those words, in view of the sense in which they are used.

On recurring to the common law definition of this crime as laid down in Hale, Hawkins, and Blackstone, works of acknowledged authority, we find the legislature have incorporated it almost literally into the statute. What is the irresistible implication? Plainly that they were used in the legal sense, and with the settled construction placed upon them. What this construction was is not doubted, and is thus stated by Justice Blackstone: "And so it is, whether the taking be strictly from the person of another or in his presence only; as, where a robber, by menaces and violence, puts a man in fear, and drives away his sheep or his cattle before his face." 4 Com. 243. That this arose from the construction of

the words, and not as a part of the definition of the crime, appears from the opinion of Lord Mansfield, in *Donelly's case*, 1 Leach, 229; S. C., 2 East P. C. 715, where it is said: "The true nature and original definition of robbery was a felonious taking of property from the person of another by force, in which there were three things to be observed—first, that it must be done feloniously, which went to the intent of the taker; secondly, that it must be taken from the person of another; thirdly, that it must be taken by force. That all the rest that was to be found in the books on this subject formed no part of the definition of the offense, but arose from legal construction, in order to prevent an evasion of the law." As, "if the owner threw down his money, or had it not about his person at the time, though it were in his presence; these, by construction, have been holden to be equivalent to an actual taking from the person."

It thus appears that the well settled legal meaning of the words, at the time they were taken from the common law and carried into the statute, were exactly as comprehensive as that put upon them by the court below; and we are of opinion it would be doing violence to the words, as well as the obvious intention of the legislature, to give them a more *restricted application, while it would render the statute entirely impotent for the punishment of the greatest offenders.

It is unnecessary to consider any but the objections made to the first count of the indictment. If that is good, it is clearly sufficient to sustain the judgment. The first exception taken to this count is that the bank notes alleged to be taken are not goods, chattels, or property having intrinsic value, and that this section of the statute does not include them as subjects of robbery. The words of the statute are "money or personal property of any value." That bank notes are not money is certain; but we think they are included, as well as other choses in action, in the general terms "personal property." All property is divided into real and personal, 2 Black. Com. 16; and personal property is divided into property in possession and property in action, 2 Id. 388, "or such where a man hath not the occupation, but merely a bare right to occupy the thing in question, the possession whereof may however be recovered by a suit or action at law; from whence the thing so recoverable is called a thing, or *chose in action*."

But this conclusion is rendered entirely decisive when the sec-

tion is read in connection with the 19th section of the same act, which provides, "That if any person shall steal or maliciously and feloniously destroy any bank bill or bills, or promissory note or notes, bill of exchange, order, receipt, warrant, draft, check, or bond given for the payment of money, or receipt acknowledging the receipt of money, or *any other property*, of the value of thirty-five dollars or upward, knowing them to be such," etc., "such person shall be deemed guilty of," etc. Swan's Stat. 233.

Now, as we have no common law offenses, the conclusion is irresistible that the legislature, when it used the word "steal," in the section punishing robbery, referred to stealing as defined by the same act; and that, as we have seen, included bank bills and other choses in action.

*It is next objected that the indictment does not aver an [427 intent to steal the bank notes, or that the accused knew their character. It is true the count does not contain these averments; but it describes the property in the language of the section on which it was founded, and avers the notes to have been actually stolen. We are of opinion this is sufficient, and that the actual stealing necessarily includes all the ingredients to make it such, embracing the intent and a knowledge of the character of the property taken.

Another objection is taken to this count—that it does not sufficiently aver the bank-bills to have been the property of Robert Morton. It contains a full description of the bills, and avers the value of each, and then adds, "of the moneys, goods, and chattels of the said Robert Morton." These words, it must be admitted, were inaccurately used. The bank bills were neither moneys, goods, nor chattels. But it was impossible that this inaccuracy should mislead or prejudice the accused, as the property stolen was fully described, and the state was confined in the proof of such description. The property thus described was called by a wrong name, but it did not in the least make uncertain the description already given. Nor are these words essential to the indictment; they may therefore be stricken out as surplusage, without any prejudice whatever to the count.

When this is stricken out, a full and accurate description of the property stolen will remain, and a sufficient averment that it belonged to Robert Morton.

Let the judgment be affirmed.

Judgment affirmed.

JEREMIAH WOODFORD v. THE STATE OF OHIO.

Where the clerk of the court has placed on the margin opposite the several counts the numbers one, two, and so on, and, by mistake or otherwise, has commenced the numbering on the second count, and the same error has been continued through the whole of the counts, and the jury have re-428] turned a verdict of guilty on the seventh and eighth counts as marked, it is error for the court to sentence the defendant on the seventh and eighth counts of the indictment, being the sixth and seventh counts as marked.

Where the court has passed separate sentences on the defendant on two counts of an indictment, on one of which counts he has been found guilty, and on the other of which he has been acquitted, and have made the sentence on which he was convicted to commence at the expiration of his term on the count on which he was not convicted, the whole judgment must be reversed.

Where an offense forms but one transaction, and the indictment containing several counts on which the jury have returned a verdict of guilty, it is error in the court to sentence on each count separately.

ERROR to the court of common pleas of Harrison county.

The plaintiff in error was indicted at the October term, 1852, for stabbing Thomas Carothers. The indictment contained ten counts, the first, under the seventeenth section of the crimes act, for assault with intent to murder; the second, sixth, seventh, eighth, and ninth counts were under the twenty-fourth section of the act, varying the intent with which, and the part of the body on which the stab was inflicted; the third, fourth, and fifth counts were under the twenty-third section, varying the intent with which the cutting is alleged to have been done; and the tenth count was for assault and battery.

The counts in the indictment had numbers marked in the margin, from one to nine in sequence; but the first count was omitted in the numbering, and the second marked number one.

The plaintiff in error was tried at the same term, and the following verdict rendered: "The jury find the defendant guilty in manner and form as he stands charged in the seventh and eighth counts, as marked in the indictment, and not guilty on the other counts of the indictment."

The court, after overruling motions for new trial and in arrest

of judgment, sentenced the plaintiff in error to be "imprisoned in the penitentiary and kept at hard labor for the term of one year, upon the seventh count of the indictment; and, after the termination of the said one year, that he be imprisoned in the penitentiary and kept at hard labor for the *further period of one year, [429 upon the eighth count of said indictment."

Bills of exceptions were taken on the trial to the admission and rejection of testimony, to the charge to the jury, and the overruling of the motions for new trial and in arrest, and various errors are assigned upon the record. But two need be referred to.

1. That the court erred in pronouncing two judgments for the same act; and

2. That the court erred in sentencing the plaintiff in error upon the seventh count of the indictment, upon which the verdict was, not guilty.

Bingham, for plaintiff in error.

Pugh, attorney general, for the state.

CALDWELL, J. This cause comes into this court on a writ of error to the common pleas of Harrison county. The plaintiff in error was indicted for an assault and stabbing, alleged to have been committed on Thomas Carothers; he was found guilty, and sentenced to two years' imprisonment in the penitentiary. Numerous errors have been assigned on the record; we have not thought it necessary to consider but one. The indictment contained ten counts, some charging an assault with intent to murder, others charging stabbing with intent to kill, wound, etc.

The clerk, previous to the trial, had placed on the margin of the indictment, opposite each count, the numbers one, two, and so on, to nine, commencing with the second count in the indictment. In this way the second count was numbered one, and the tenth count numbered nine; this made the eighth and ninth counts in the indictment the seventh and eighth, as numbered in the margin. The jury returned a verdict as follows: "That the defendant is guilty in manner and form as he stands charged in the seventh and eighth counts, as marked in the indictment, and not guilty on the other counts."

The court sentenced the defendant to imprisonment in the penitentiary on the seventh count of the indictment, for one *year, [430 and one year on the eighth count of the indictment; the latter

Lawrence, ex parte.

term of one year, to which the defendant was sentenced on the eighth count, to commence at the expiration of the term of one year, to which the defendant was sentenced on the seventh count.

Now, there is nothing technical or formal in the finding or verdict of a jury. The charges are set forth in technical form in the pleadings. In a case like this, where the jury find the defendant guilty of some of the charges, and not guilty of others, it is only necessary that they should point out with certainty upon what charges they find guilty, and of what they acquit; if they do this, it matters not what terms of indication they may use. It was perfectly clear, both from the record itself and from the affidavits of the jurors, that the jury found the defendant guilty on the seventh and eighth counts as numbered on the indictment, which were the eighth and ninth counts of the indictment; and these were the only counts on which the defendant could be sentenced; he was acquitted on all the other counts. The court sentenced the defendant on the seventh and eighth counts of the indictment; on the former of which he had been acquitted by the verdict of the jury. This is clearly erroneous. The judgment on the eighth count of the indictment, which was the seventh count as marked, was supported by the verdict; but the term of one year's imprisonment to which the defendant was sentenced on that count was made to commence at the expiration of the term of one year to which the defendant was sentenced on the former seventh count. The judgment is, therefore, not severable, and will have to be reversed in whole, and the cause remanded.

Judgment reversed.

[431] *WILLIAM LAWRENCE, REPORTER OF THE LATE SUPREME COURT IN BANK, EX PARTE.

Where the duties of an officer are specified and limited in their character, and not continuous during the year, an annual salary prescribed by law, as the compensation, will be payable and apportioned with reference to the duties performed, and not to the lapse of time.

The present supreme court being a distinct tribunal from the late supreme court in bank, and its successor only as to pending causes, the reporter of the former is not the successor of the reporter of the latter.

Lawrence, ex parte.

APPLICATION for a mandamus, to William D. Morgan, auditor of state, to require the payment to relator, of the balance of his salary as reporter for the late supreme court in bank for one year.

William H. West, attorney, for the relator.

G. E. Pugh, attorney general, for the defendant.

BARTLEY, C. J. Where the duties of a public officer, entitled to an annual salary, continue through the entire year, the salary accrues and becomes payable for the space of time only during which the duties are required to be performed; and a repeal of the law creating the office before the expiration of the year, would stop the accruing compensation at the time when the duties of the office ceased.

But where the duties of an officer, entitled to an annual salary are of such a nature that all his duties for the year may be performed and completed within less time than the year, the compensation for the entire year would be payable, in case the duties required by law for the year are performed, although the office might be abolished before the end of the year; and, in such case, where there is only a partial performance before the abolishment of the office, the compensation should be apportioned to the duties performed and not to the lapse of time.

The relator, as reporter for the supreme court in bank, was required to attend the sessions of the court, and report the cases decided. But one term of the court for the year was authorized, and the relator attended this term and reported *the cases de- [432] cided; and faithfully performed all the duties required of him for the entire year, and although his office expired by the operation of the constitution of 1851, before the end of the year, yet, having performed all the duties required of him by law for the year, he became entitled to the annual compensation.

The present supreme court being a different and distinct tribunal from the late supreme court in bank, and its successor only as to pending causes, the reporter of the former did not succeed to the office of reporter of the latter.

The writ is allowed.

Logan Branch Bank, *ex parte*.

THE LOGAN BRANCH AT LOGAN OF THE STATE BANK OF OHIO,
EX PARTE.

The appellate jurisdiction of this court extends only to the judgments and decrees of courts created and organized in pursuance of the provisions of the constitution.

The appeal from the decision of the auditor of state, provided for in the 74th section of the act of April 13, 1852, "for the assessment and taxation of all property in this state," etc., is in conflict with the provisions of the constitution, from which the jurisdiction of the court is derived, and can not, therefore, be had.

APPEAL from the decision of the auditor of state.

H. H. Hunter, for the bank.

Pugh, attorney general, *contra*.

CORWIN, J. This is an appeal brought to us under the seventy-fourth section of the act of April 13, 1852, "for the assessment and taxation of all property in this state, and for levying taxes thereon, according to its true value in money," which provides that the auditor of state, with the advice of the attorney general, "shall decide all questions which may arise as to the true construction of this act, or in relation to any tax levied, or proceeding under the same, subject, however, in all cases, to an appeal to the supreme court." 50 Ohio L. 166.

433] *The Logan Branch of the State Bank of Ohio submitted to the auditor of state, for his decision, its complaint against the taxes assessed and levied upon it under the act before referred to; and the decision of the auditor thereon is brought here *ex parte*, for review. And the first question for consideration is whether this court have any jurisdiction over the subject as now presented?

With reference to the statute itself, it may be remarked, that it does not purport to clothe the auditor of state with judicial powers and functions; it imposes no new or additional duty upon him; for in the exercise of the duties of his office as auditor of state, the decision of all questions arising under the law affecting his official obligations would necessarily devolve upon himself in the first place; and it is by his own decisions, guided by the best lights around him, that his official action must always be regulated; sub-

ject, of course, to such rules as may have received judicial sanction. But this law authorizes him to go no further. He can render no judgment against any party, and is powerless to enforce any judgment. He has not, in fact, undertaken to pronounce any judgment, and the appellate jurisdiction of this court only extends to the judgments or decrees of an inferior court.

The original jurisdiction of this court is limited by the constitution to writs of quo warranto, mandamus, habeas corpus and procedendo; and as this case does not come under either of the heads of original jurisdiction, it must be entertained under our appellate jurisdiction, or be dismissed. The constitution provides that the supreme court may have "such appellate jurisdiction as may be provided by law." And it is claimed that the law has provided for this appeal. But to this it must be answered, that the law provided for this appellate jurisdiction must not be in disregard of the other provisions of the constitution. Section 1, article 4, of the constitution, provides that "the judicial power of the state shall be vested in a supreme court, in districts courts, courts of common pleas, courts of probate, justices of the peace, *and in such other courts [434 inferior to the supreme court, in one or more counties, as the general assembly may from time to time establish.

The 10th section of the same article provides "that all judges, other than those provided for in this constitution, shall be elected by the electors of the judicial district for which they may be created, but not for a longer term of office than five years."

Thus all the judicial power of the state is vested in the courts designated in the constitution, and in such courts as may be organized under the first section. But it is perfectly clear that, upon the creation of any additional court by the legislature, the judicial officer must be elected, as such, by the electors of the district for which such court is created; and it is not within the competency of the legislature to clothe with judicial power any officer or person not elected as a judge. Inasmuch, therefore, as the auditor of state can in no sense be considered as having exercised any judicial function in the premises, and as we have no idea of an appeal, except from one court to another, this proceeding must be dismissed for want of jurisdiction.

Appeal dismissed.

THURMAN, J., did not sit in this case.

GEORGE W. GALLOWAY AND OTHERS v. SAMUEL STOPHLET.

A writ of certiorari does not lie to review the order of a court of equity overruling exceptions to testimony.

THIS is a writ of certiorari to the district court of Crawford county; the object of which is to reverse an order overruling exceptions of the plaintiffs in certiorari, defendants below, to a deposition taken in behalf of defendant in certiorari, complainant below, in a chancery cause then and yet pending in that court. The notice to take the deposition specified that it would be taken between 8 o'clock A. M. and 6 o'clock P. M. It was taken, and the witness left before 2 o'clock P. M. After this, and before 6 o'clock, the counsel of 435] *the opposite parties appeared, in order, as he said, to cross-examine. When the witness left, he promised to return in time for a cross-examination before 6 o'clock, but he did not return at all, and so was not cross-examined. On hearing of the exceptions, affidavits were read on both sides, one of which tended to prove that the counsel taking the deposition called upon the opposite counsel at the time it was taken, and requested him to go to the justice's office and cross-examine, if he desired to do so. But he did not go until after the witness had left. No design to prevent a cross-examination was imputed to the party taking the deposition, or to his counsel, or to the witness. But it was contended that the opposite party had by law, under the notice, the whole time up to 6 o'clock in which to appear and cross-examine, and that, as the deposition was taken before that time and before he had so appeared, it must be rejected. The district court overruled the exception, and this ruling is now assigned for error.

Watson, for the plaintiff in certiorari, argued:

1. Certiorari is a proper remedy in this case.

In *Taylor's Lessee v. Boyd*, 3 Ohio, 338, the reversal of a decree on error was held valid.

In 1 J. J. Marsh. 23, a writ of error was entertained to reverse a decree in chancery.

In *Kern's Adm'r v. Foster*, 16 Ohio, 274, the court intimated their willingness to entertain a certiorari in chancery; but rejected the remedy in that case, because the party might have appealed.

2. The exception to the deposition was well taken.

Galloway v. Stophlet.

The notice was to take between 8 A. M. and 6 P. M., and under such a notice there is no safety but to give the adverse party the full time. The party giving the notice had a right to select his own time. Having extended it by his notice to 6 o'clock, he was bound to have the witness in attendance until that hour for cross-examination.

Adams, for the defendant, submitted the cause without argument.

**THURMAN, J.* Taylor's Lessee v. Boyd does not aid the [436] plaintiffs. When the proceedings therein referred to occurred, the practice act authorized decrees in chancery of the common pleas to be examined, and reversed or affirmed, upon writ of error. 2 Chase, 1275, sec. 95. That statute has long since been repealed, and with it the remedy is gone. A similar statute in Kentucky authorized the case cited in *J. J. Marshall*.

In *Kern's Adm'r v. Foster*, it was held that "a writ of certiorari is not the mode of questioning the regularity of a sale and order of confirmation in chancery." After stating that an appeal lay from such an order, the court add: "A plain method existing then of bringing the question of confirmation and the regularity of the sale before the supreme court by appeal, we are not disposed to recognize the additional remedy of a writ of certiorari, which is a proceeding that, if not wholly unknown to chancery, would, at farthest, only be resorted to in cases where there was no other remedy." Plaintiffs' counsel contends that this is a recognition of the propriety of the writ where there is no other remedy. We do not think so. It is a mere hypothesis. The court speak of the writ as wholly unknown to chancery; but, out of abundant caution, they add that, even if known, they would only sustain it where there was no other remedy.

A court of law does not sit to review the decisions of a court of equity, nor does the chancellor sit to re-examine the proceedings of the law courts. 3 Ohio, 19. And although in this state both jurisdictions are vested in the same judges, they are nevertheless as distinct jurisdictions as though they were exercised by different tribunals. Sitting as a court of law, then, we can not reverse or affirm an order in chancery; from which it follows that if the present writ can be sustained, it must be regarded as issued out of chancery. Formerly, in England, original writs, even in common

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law actions, were issued out of the court of chancery, and made returnable in the proper law court. 3 Chitty Pr. 144, 145. Hence 437] we find the writ of certiorari spoken of *as issuing out of chancery. But not for this reason alone, for it is also employed in equity cases to bring up a record to be used as evidence, or to remove causes from certain inferior courts of equity into the court of chancery. 1 Maddock Ch. 12; Id. 181; 1 Jac. Law Dic. 411; Williams Law Dic., title Certiorari; 2 Cha. 109; 1 Ver. 178.

But we have discovered no case in which it has been used as a means of reviewing, and affirming or reversing a decree of a court of equity.

But were the remedy admissible, it would not avail the plaintiffs in the present suit. For it has been repeatedly decided that, in this state, contrary to the practice in England, a writ of certiorari will not be allowed before the final disposition of the cause in the court below. *Herf v. Shulze*, 10 Ohio, 268; *Dixon v. Cincinnati*, 14 Ohio, 249. It would present a strange spectacle for us to be trying the question whether a district court properly admitted testimony, and, at the same time, the latter court be proceeding to final decree between the parties. And of what avail could our decision be, if, before it was given, such final decree should be pronounced?

We are unanimously of opinion that the writ was improvidently issued, and consequently the cause must be stricken from the docket.

As the question relative to the deposition is not properly before us, we do not feel at liberty to express any opinion upon it.

THE STATE OF OHIO ON RELATION OF EZRA E. EVANS v. GILMAN
DUDLEY.

The act to erect the county of Noble, passed March 11, 1851, is not inconsistent with the present constitution of the state, nor repealed by it.

INFORMATION in the nature of *quo warranto*. The relator, Ezra E. Evans, probate judge of Morgan county, having filed his affi-

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davit and moved the court for leave, at the January term, the attorney general filed the following information :

*" In the supreme court of the state of Ohio, January term, [438 in the year one thousand eight hundred and fifty-three.

" George E. Pugh, attorney general of the state, comes here into the court, in the city of Columbus, this seventeenth day of January, in the year one thousand eight hundred and fifty-three, and gives the court to understand and be informed, on the relation of Ezra E. Evans, that the office of probate judge for the county of Morgan, is a public office of trust and profit, according to the constitution and laws of the State of Ohio, the duties whereof are to be exercised within the county of Morgan aforesaid.

" And that Gilman Dudley, for the space of ten months, now last past, and more, has intruded into and usurped the said office, and does still usurp the same, at Sarahsville, in the county of Morgan aforesaid, by granting letters of administration upon the estates of deceased persons, granting letters of guardianship of the persons and estates of infants, granting licenses of marriage, granting writs of habeas corpus and injunction, and performing other the duties of a probate judge, as prescribed in the constitution and laws of the state aforesaid, without any legal warrant, grant, or right whatsoever, to the damage and prejudice of the State of Ohio, and against her dignity.

" Whereupon the said attorney general now prays the advice of the court in the premises, and due process of law against the said Gilman Dudley in this behalf to be made. And that he, the said Gilman Dudley, may answer to the State of Ohio, upon the relation aforesaid, by what warrant he claims to hold the said office, or to exercise the powers, perform the duties, and receive the fees and emoluments thereof."

G. E. PUGH, *Attorney General*.

To which the defendant pleaded that " he was not guilty of the said intrusion and usurpation in manner and form as *the [439 relator hath alleged against him, etc.," and the cause was submitted upon the following agreed case :

" The parties submit this cause to the court under the pleadings, upon the following agreed facts : Ezra E. Evans is the probate judge of Morgan county, and Gilman Dudley is the probate judge of Noble county, if any such county as Noble now legally exists. An act entitled ' an act to erect the county of Noble ' was passed

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and bears date March the 11th, 1851, with a population of about 19,000. All the officers for the county were duly created and acting—the seat of justice established—the necessary public offices opened—the seal of the county furnished by the secretary of state—causes pending in the court of common pleas—the county laid off into election districts, and the places for holding elections therein designated, before and on the 17th day of June, 1851, pursuant to the act erecting the county, and the other laws then in force in Ohio. On the 17th June, 1851, the qualified electors in the several election districts of that county voted for and against the adoption of the new constitution, returns whereof were made, counted, and accompanied the proclamation of the governor on the 7th day of July, 1851, for Noble county, in the same manner as the other counties of the state. At the October election, 1851, the electors of Noble county voted for state and county officers, and the returns thereof were duly made to the secretary of state and the speaker of the senate, and the returns to the speaker of the senate were, on the 7th, 8th, and 9th of January, 1852, opened and counted in joint convention of both branches of the general assembly, and journalized in each branch thereof, with and in the same manner as the other counties of the state. At the said October election, Gilman Dudley was elected probate judge of Noble county, commissioned, gave bond, took the oath of office, and exercises his said office within Noble county, pursuant to the laws prescribing such election, qualification, and duties; and exercises jurisdiction in all matters pertaining to his said office over all that part of Noble 440] county which belonged *to Morgan before the erection of Noble, and which now, as a part of Morgan, belongs to the jurisdiction of E. E. Evans, if Noble has no existence. If, upon this state of the case, the court shall be of opinion that no such county as Noble now exists in law, and that therefore the said Gilman Dudley ought not to have his said jurisdiction, then judgment of ouster is to be awarded against him, otherwise judgment is to be awarded in his favor for costs."

Hunter and Hanna, for relator.

Parrish, Ferguson, and Birchard, for defendant.

RANNEY, J. The agreed statement of facts, signed by the parties, and upon which this cause is now submitted to the court, makes the whole controversy depend upon the solution of this

question—Is the county of Noble, at this time, a legally organized and existing county of the state? If it is, it is conceded the defendant is the probate judge thereof, and exercising his office within it, and not elsewhere; if it is not, he is assuming to act within the boundaries of the county of Morgan, and is guilty of the intrusion and usurpation charged upon him.

The act to erect the county of Noble was passed by the last general assembly convened under the constitution of 1802, on the 11th day of March, 1851, the next day after the adoption, by the convention, of the constitution now in force.

It is expressly admitted by the counsel for the relator that the legislature, "at the time the law was passed, had full power under the old constitution to enact such a law;" that the county was legally organized under it, and continued to exist until the first day of September of that year, when the present constitution took effect. But they insist that its continued existence is inconsistent with the provisions of that instrument, and, "if inconsistent with it, like all such laws previously existing, it ceased to be a law on the first day of September, A. D. 1851, and the legal existence of the county ceased at the same time; and, as a consequence, for the want of a legal existence of the county, the defendant, by *virtue of his election to the office of probate judge, can not [441 lawfully exercise the office, the territory embraced within the county, by legal operation, having fallen back to the original counties from which it was taken." In short, their position is that the law erecting the county is inconsistent with the present constitution, and was repealed by it when it took effect. If such inconsistency is found to exist, after a fair and honest effort to reconcile them, it can not be doubtful which must give way, and the conclusion contended for by the relator would inevitably follow.

The rule by which we should be guided in pursuing this inquiry is well settled. As repeals by implication are not favored, the repugnancy between the provisions of two statutes must be clear, and so contrary to each other that they can not be reconciled, in order to make the latter operate a repeal of the former. This rule is the result of a long course of decisions, and we know of no reason why it does not equally apply, when the repugnancy is alleged to exist, between a constitutional provision and a legislative enactment. With this principle in view, we proceed to the inquiry, Does such necessary and obvious repugnancy exist between the law creating

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this county and the constitution? It is claimed by the relator to arise from the necessary workings of the 9th article of the constitution, and the 19th section of the schedule, apportioning the state for senatorial, representative and judicial purposes; and it is insisted that the continuance of the county has the necessary effect of altering the territorial arrangement prescribed by the constitution for these purposes, and of depriving the inhabitants of this county of their right of suffrage and representation in these departments of the government. If this conclusion is legitimately drawn, it can not be doubted that the law must give way and the county cease to exist. The constitution divides the whole state for these purposes, and secures to all the people in it these important rights—rights lying at the very foundation of every free government, and 442] not to be invaded or impaired by any *legislative enactment, either prior or subsequent to its adoption.

We further agree with the counsel for the relator that the constitution must receive the same construction since its ratification by the people that it would have received when it passed from the hands of the convention. By its own provisions, however, it could have no effect until ratified by the people, and until the first of September following the time fixed for its operation. As a necessary result from this principle, things as they existed on the 10th of March, when it was adopted by the convention, must control in its construction. In short, the instrument speaks from the 10th of March, although by its own terms its effect was postponed to the first of September. As a further consequence, the apportionment of the state must be regarded as made by the convention, and none the less so because the approval of the people was made necessary to its ultimate effect. They but ratified and approved an act already done by their representatives in convention, and were not, in any correct sense, the authors of the act itself.

Before proceeding to a particular examination of the question in its application to each of the departments of government before mentioned, it will be necessary to have a clear understanding of two propositions, equally applicable to each, and upon which, it seems to me, all correct reasoning must proceed.

And first, the constitution apportions political power amongst the inhabitants of the state as nearly equally as possible, in proportion to numbers, without any regard whatever to property, or, indeed, to any other circumstance. Inhabitants alone are represented; a

given number in one place exercise the same political power as a like number in any other locality. I am aware that some departure from the absolute equality of numbers is allowed in favor of the inhabitants of small counties, in the constitution of the house of representatives; but this in no wise changes the *basis* of representation from population to territory or property.

*Second, the whole state is divided into districts, and the [443 limits of each clearly and definitely fixed. These limits were, in every instance, described by county lines, as they existed when the constitution was adopted by the convention—the boundaries of counties being referred to and adopted, from convenience and propriety, as the boundaries of districts; and thus making the limits of each district as certain as though it had been marked out by natural or artificial objects. While the counties remained as they then were, of course, no one of them could be divided so as to fall into different districts. But while the boundaries of counties, to a certain extent, and districts, were fixed upon the same lines, they were yet independent of each other; so that whatever changes might be made in county limits, the lines of the districts remained as before, subject only to such changes as are provided for in the constitution itself.

How far changes are authorized, and by whom, and in what manner effected, I shall have occasion to notice particularly in the further progress of this opinion.

To construct a scheme of constitutional apportionments, to endure for many years, and, so far as the election of members of the general assembly is concerned, subject to no control or alteration by that body, is a work of much difficulty, when it is considered how constantly and materially changes are being wrought in the political divisions of the state, and in the relative increase of population. And yet I am much mistaken if the system adopted by the convention is not found entirely adequate to accomplish all the substantial purposes proposed, and one of the most valuable features of the constitution. The state has been subjected to a most humiliating experience, while the power was left with the general assembly; and the scenes of anarchy and confusion, which had marked its exercise there, undoubtedly determined the people to deprive that body of it absolutely, so far as the election of their own members was concerned, for the future.

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444] *Slight inconveniences may arise from this determination, but evils of much graver importance will be avoided.

With these considerations in view, and considering the foregoing propositions as undeniably correct—that all the inhabitants of the state have the constitutional right to be represented in the legislative and judicial departments, and all the electors of the state the right of suffrage in their several districts, to elect the necessary officers to fill these departments; and also that no change can be made in the constitutional districts, other than those expressly provided for in the constitution—we are brought to the direct question: Can Noble county continue to exist, consistently with the full enjoyment of these constitutional rights?

After a careful examination of all the objections urged, four of the members of this court are of opinion that it can; and that there is no necessary conflict between the law creating it and the constitution of the state.

A more detailed examination of these objections, in their application to the election of senators, representatives, and judges of the court of common pleas, will sufficiently illustrate the grounds upon which our conclusion is based.

I. By the 7th section of article 9, the state is divided into thirty-three senatorial districts, electing, for the first decennial period, thirty-five senators. Of these districts, the counties of Washington and Morgan constitute the fourteenth, and Guernsey and Monroe the nineteenth. From these two districts, the county of Noble was afterward taken, and the consequence is, a part of the citizens of this county must continue to vote, and be represented in the senate, in one of these districts, and the residue in the other. By the 10th section of the same article, it is expressly provided "that no change shall ever be made in the principles of representation as herein established, or in the senatorial districts, except as above provided." The exception refers to the 8th and 9th sections, the first of which provides for the apportionment of fractions, after the first ten years, and for annexing districts which may fall below
445] three-fourths of a senatorial ratio *to an adjoining district; and the last gives to any county included in a senatorial district, which has acquired a population equal to a full senatorial ratio, the right, at any regular decennial apportionment, to be made into a separate senatorial district, if a full senatorial ratio is left in the district from which it is taken. Subject to these qualifications,

which have no bearing upon the question under consideration, the districts formed by the constitution must forever remain unchanged.

These districts, as we have already seen, are composed of the *territory* embraced in the counties named at the time they were made, and are not liable to fluctuate with any subsequent change of county limits. Are such changes of county lines therefore prohibited? If not, it is very clear that they *may* always result in leaving part of a county in one senatorial district, and the residue in another. That no such prohibition, or any provision requiring the senatorial districts to continue to be bounded by existing county lines, is to be found in the constitution, must be admitted. On the contrary, the convention adjourned, leaving a legislative body in session with full power, as is admitted, to work such changes; and by section 30 of article 2 such changes are expressly provided for after the constitution should have taken effect. If this county had been erected since the constitution took effect, with the same boundaries it now has, and, of necessity, divided for senatorial purposes, it is admitted the act would be without objection, and its existence entirely *consistent* with the other provisions of the constitution. How the same precise effect, worked by a law passed by a general assembly having full power to do so, before the constitution was in force, can be said to be *inconsistent* with the same provisions, is what we are unable to understand.

The truth is, the power to make new counties and change county lines has always existed under both constitutions; under that now in force, it is true, subject to very important safeguards. Its exercise under either, since the apportionment made by the convention, might work the inconvenience *of dividing a county into [446 different senatorial districts, but could not in any manner deprive the inhabitants of their right of representation and suffrage in electing members of that body, or work any change in the boundaries of districts. This inconvenience should constitute a very strong argument against the exercise of the power, unless in cases of strong necessity, but can not in the least detract from the power itself; and the power must in all cases be measured by the constitution in force when the law is passed.

II. The next inquiry relates to the election of members of the house of representatives.

Section 10 of article 2, already quoted in part, provides: "For

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the first ten years after the year one thousand eight hundred and fifty-one, the apportionment of representatives shall be as provided in the schedule, and no change shall ever be made in the principles of representation, as herein established, or in the senatorial districts, except as above provided. All territory belonging to a county at the time of any apportionment, shall, as to the right of representation and suffrage, remain an integral part thereof, during the decennial period." By reference to the 19th section of the schedule, it will be seen that the counties of Morgan, Monroe, Guernsey and Washington, are each constituted separate representative districts, and a representation awarded to each, according to the population it then contained.

These provisions irrevocably fix the districts, and apportion the representation for ten years. At the expiration of that period, other sections of the 9th article direct specifically in what manner the executive officers charged with the duty, shall ascertain and fix it for another period of ten years; but it is unnecessary to refer to them in detail, as they throw no light upon the pending question. It is sufficient to say that, in pursuance of the principles established in this article, and which are forever to remain unchanged, an apportionment is to be made once in ten years—the ratio for a representation being ascertained by dividing the whole population of 447] the state by the number one hundred; each *county then existing having a population equal to half said ratio is entitled to a separate representation, and those falling below that number are to be attached to the adjoining county having the least population.

From all this it is manifest that no change, alteration, or modification of the representative districts is allowed between the periods of decennial apportionment; and all that has been said of the senatorial districts is, to this extent, strictly applicable to the representative districts, but, unlike the senate districts, they are not forever to remain unchanged. On the contrary, they must, of necessity, at the expiration of each ten years, so change as to conform to the boundaries of counties as they are then found to exist; and the limits of districts at those periods become again identical with those of counties.

Now, by the first clause of section 10, article 9, it is provided: "For the first ten years after the year one thousand eight hundred and fifty-one, the apportionment of representatives shall be as pro-

vided in the schedule." This apportionment, as we have already settled, was made by the convention on the 10th of March, 1851, although subsequently approved by the people. At that time the territory now included in Noble county belonged to the counties from which it was taken, and it necessarily follows, not only from the principles already discussed, but by the positive provision of the last clause of the same section, that this territory must continue during the decennial period, "as to the right of representation and suffrage, to remain integral parts" of such counties. This result, so far from being *inconsistent* with the operation of this apportionment, is the very state of things contemplated by that clause, and the very state of things which *must* always occur whenever a new county is made, or a county line changed, between the periods of decennial apportionment; and, I may add, the very state of things provided for by section 3, article 7, of the constitution of 1802. But it is claimed that this clause only provides for territory taken from a county after the present constitution *took [448 effect. The phrase is, "belonging to a county at the time of *any* apportionment." Now, if the convention did make an apportionment for ten years, and did make it on the 10th of March, as we have supposed, the language would seem to be too plain to admit of construction, and its application to *this* apportionment too obvious to require comment. That they did make it, and at that time, we have already settled without the least doubt in our minds.

It was made by the convention to take effect at a future day, provided it was ratified and approved by the people.

III. The judicial apportionment.

By the 12th section of article 9th, the county of Washington is placed in the third subdivision of the seventh judicial district, and the counties of Monroe and Guernsey in the second, and the county of Morgan in the first subdivision of the eighth district. The general principles already discussed being equally applicable to these districts need not be again repeated. An important distinction is, however, here to be noted. While the general assembly is deprived of all power over the legislative districts, they are invested with full authority to alter, change, and add to the judicial districts. The 15th section of article 4th provides: "The general assembly may increase or diminish the number of the judges of the supreme court, the number of the districts of the court of common pleas,

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the number of judges in any district, change the districts, or the subdivisions thereof, or establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition, or diminution shall vacate the office of any judge."

It is insisted by the relator that these districts must always continue to be bounded by county lines—that the general assembly has no power to attach Noble county as a whole to any one of these districts; but if they had, an election was to be held for judicial officers before a general assembly could convene, at which the electors included in Noble county would be deprived of their right of suffrage.

449] *In support of the first proposition the 3d section of article 4 is relied upon, which provides: "The state shall be divided into nine common pleas districts, of which the county of Hamilton shall constitute one, of compact territory, and bounded by county lines," etc. To construe properly this provision, reference must be had to other parts of the constitution. It certainly can not mean that the number of districts shall always continue to be nine, since power is given to the general assembly to increase or diminish them. It is equally clear that it can not mean that the county limits shall always remain the same, as full power is given to change them and to make new counties. To hold, on the other hand, that the limits of the districts must, of necessity, enlarge or diminish with the counties named as embraced in them, would be to say that Hamilton county, so reduced by division as to contain but twenty thousand inhabitants, would still constitute a district and be entitled to elect three judges. When taken in connection with the fact that the convention itself proceeded to make the division referred to in this section, it is very clear to us that it must be regarded mainly as prescribing a rule for the government of their own action; and when they did act in accordance with it, and fixed the districts by definite boundaries, they must so remain, securing to all the citizens included within them their right of suffrage in such districts, until changed by legislative enactment.

But the convention foresaw the difficulty of having the territory included in a new county in different judicial districts or subdivisions, and have provided for it in the most explicit manner in article 9, section 13, as follows: "The general assembly shall attach

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any new counties that may *hereafter* be erected to such districts or subdivisions thereof as shall be most convenient."

This section, in our opinion, very clearly applies to any new county erected after the adoption of the constitution by the convention. This construction does not require any *effect to [450 be given to the constitution before the 1st of September, but, after it has taken effect, it directs the general assembly what to do with counties erected after the 10th of March; or, in other words, it imperatively requires the general assembly, acting under the constitution, to attach all counties created after that date to some convenient district and subdivision. If this view is correct, the objection that the electors of Noble county could not vote at the judicial election of 1851 has no foundation in fact; but, whether correct or not, it is certainly clear that the general assembly were not only fully authorized, but required to so attach it as to give its inhabitants the full benefit of the judicial system; and this mandate of the constitution has been obeyed. A failure to do so, at the time the county is created, whether under the former constitution or the present (and the same difficulty from such an omission might now arise), would not make the law repugnant to the constitution, but would only show a necessity for further legislation in order to the enjoyment of all its benefits; it would not nullify what had been properly done, but would require more to be done to make the work perfect. Nor would such a result, by any means, be confined to a case like the present. Time would fail me to enumerate the instances where the enjoyment of constitutional privileges is made dependent upon legislation. Suffice it to say that, while the constitution creates courts, they are utterly powerless to redress wrongs until their jurisdiction is defined by law; and while each county is entitled to have sessions of the court of common pleas each year, still none can be held until fixed by the legislature.

Some remarks have been made as to the manner the law under consideration was passed through the legislative body. It is only necessary to say that such considerations can not be permitted to influence judicial action. The members of that body were responsible for their official conduct to the people that elected them, but not to the judicial tribunals. The only question that can here arise is one of constitutional power. If that is found to exist, however much they may *have abused the confidence reposed [451

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in them, it can in no degree justify a court in usurping power to remedy the evils they may have committed.

BARTLEY, C. J., dissented.

I regret that I can not concur in the opinion of the majority of the court in this case. And the question involved is of such a nature as to require a statement of the reasons of my dissent, which I shall endeavor to give with all the brevity consistent with perspicuity.

I know nothing of the influences, local or political, which have operated either in favor of, or against the new county of Noble. I consider the case before us as involving purely a question of constitutional interpretation.

I recognize the doctrine, that a law shall not be adjudged void on the ground of unconstitutionality, unless it be in a case of clear and undoubted conflict with some provision of the constitution. But where that conflict with the constitution does plainly exist, it is the imperative duty of the court, without the slightest shrinking from the responsibility or delicacy of the question, to declare the law unconstitutional and void.

The investigation of this case has brought my mind to the clearest conviction of the following conclusions :

1. That the law creating the county of Noble was clearly inconsistent with the express provisions and plain intent of the present constitution of the state when it took effect on the first day of September, 1851.

2. That this inconsistency abrogated the law, and was fatal to the existence of the new county.

No one will presume to controvert the position that all laws of the state *inconsistent* with any express provision and the clear intent of the constitution were abrogated when the constitution went into operation. The framers of the constitution deemed it even necessary to provide in the first section of the schedule that all laws *consistent* with the constitution should continue in force until amended or repealed.

452] *A county is a municipal corporation covering a certain portion or district of country, instituted as a department of the state for the purposes of the more convenient administration of justice, and the better government of the territory included. That the framers of the constitution had the power to abrogate existing

counties and authorize new and different county organizations cannot be denied.

The right of suffrage, the right of representation in the general assembly of the state, and the right to the use of the judicial tribunals for the administration of justice, are fundamental rights guaranteed by the constitution to all the citizens of the state. The county organizations are designed chiefly to aid in the more convenient and useful exercise of these important functions. And, I presume, it will not be controverted that, if, when the present constitution went into operation, there was any county organization not recognized in the constitution, the existence of which would have deprived any portion of the people of the state of either one of these fundamental constitutional privileges, that such county was abrogated by the constitution.

The first section of the fifth article of the constitution secured to every white male citizen of the age of twenty-one years *the right "to vote at all elections."* And, according to the fourth section of the same article, no person can be excluded from the privilege of voting, or of being eligible to office, except a person convicted of some infamous crime.

Any law which, in its operation, would have abridged this right of suffrage, or eligibility to office, as to any portion of the citizens of the state, at any election, or in the election of any officer, would have been in conflict with this provision of the constitution.

The third section of the fourth article of the constitution contains the following :

"The state shall be divided into nine common pleas districts, of which the county of Hamilton shall constitute one, of compact territory, and bounded by county lines; and each of said districts, consisting of three or more counties, *shall be sub-divided [453 into three parts of compact territory, bounded by county lines, and as nearly equal in population as practicable; in each of which one judge of the court of common pleas for said district, and residing therein, shall be elected by the electors of said sub-division. Courts of common pleas shall be held, by one or more of these judges, in every county of the district," etc.

Pursuant to this provision, the whole state is apportioned into judicial districts and subdivisions by the twelfth section of the eleventh article, in which every county in the state, at the time the constitution was framed, is named, the county of Noble, of course,

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not being among the number. This apportionment of the state, for judicial purposes, has express reference to the geographical limits of each county as it then existed, and without which the apportionment for the whole state could not have been perfect; and each of the districts, as well as each of the subdivisions, *was bounded by county lines*. In this apportionment, a part of the territory taken to compose the county of Noble was included in the seventh judicial district, and another part in the eighth judicial district; a part was included in the third subdivision of the seventh district, a part in the first subdivision of the eighth district, and another part in the second subdivision of the eighth district.

The constitutional convention adjourned on the tenth day of March, 1851; the law for the creation of the county of Noble was passed by the legislature on the next day, being the eleventh day of March; the constitution was adopted by the people of the state on the seventeenth day of June, 1851, and took effect on the first day of September following. No legislation could take place under this constitution prior to the first day of January, 1852. And the fourth section of the schedule provided that the first election of judicial officers should take place on the second Tuesday of October, 1851.

If the county of Noble had any legal existence as such county, at the time the constitution went into operation, it could neither belong to any one of the judicial districts, nor to any one of the **454**] judicial subdivisions, inasmuch as they were *expressly and positively required to be bounded by county lines; and, as such county, it was attached to none of them. The consequence would have been inevitable—that the citizens of the territory composing Noble county would have been, by the existence of such county, disfranchised at the first election of judicial officers, the third section of the fourth article of the constitution requiring that the judge of the court of common pleas of each subdivision should *be a resident therein, and elected by the electors thereof*. And the county was not entitled to have the court of common pleas held within it, the same article of the constitution authorizing said court to be held only in the counties belonging to some one of the judicial districts.

The boundaries of the judicial districts and subdivisions, created by the constitution, and which existed when the constitution took effect, were the county lines, as is very definitely and clearly ex-

pressed in the constitution. The creation of Noble county, under the old constitution, between the time when the present constitution was framed, and the time when it was adopted by the people, could not have changed the boundaries of the judicial divisions prescribed by the new constitution. The existence of Noble county, therefore, as such, at the time when the constitution went into operation, was plainly inconsistent with the express provision that the judicial districts and subdivisions should each be composed of "*compact territory, and bounded by county lines.*" If, when the constitution went into effect, on the first of September, 1851, Noble county existed as one of the counties of the state, the judicial districts and subdivisions were not all composed of "compact territory, bounded by county lines, and as nearly equal in population as practicable." Consequently, when the operation of the constitution commenced, the judicial apportionment was imperfect, and one of the existing counties of the state left out entirely, and no provision made for it. And unless subsequent legislation could remedy the difficulty, Noble county could never have had a court of common pleas. Appeals from the judgment of justices of the peace, within the territory of Noble county, would either [455 have been prevented altogether, or been carried to the common pleas of the different counties from which the territory of Noble was taken. No appeals could be taken from the county commissioners, and the court of the probate judge would be the court of last resort in the county. The citizens in one part of the territory would have sued and been sued in the court of common pleas in one county, while the citizens of another part would have sued and been sued in a different court of common pleas, and in a different county—a difficulty which the framers of the constitution undertook, by express provision, to prevent.

The constitution contains no provision to meet the event of the creation of an additional county between the time when it was framed and the time when it went into operation. This is undeniable. The test, however, whether the county of Noble was abrogated is its consistency with the provisions of the constitution at the time when it took effect, and not the possibility of amending or removing the inconsistency by subsequent legislation. All laws inconsistent with the constitution at the time when it went into operation were abrogated or annulled. If Noble county was inconsistent with the constitution on the first day of September, 1851,

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it lost its vitality as a legal existence, and could not have been revived by subsequent legislation without pursuing the forms of creating a new county prescribed in the 30th section of the 2d article of the present constitution.

The fifteenth section of the fourth article of the constitution provides that, "The general assembly may increase or diminish the number of the judges of the supreme court, the number of the districts of the court of common pleas, the number of judges in any district, change the districts, or the subdivisions thereof, or establish other courts, whenever two-thirds of the members elected to each house shall concur therein."

This furnishes no remedy for the difficulty. It does not authorize the annexation of a new county not previously included in the apportionment to any existing district or subdivision. It simply provides for a change in the boundaries of the districts and subdivisions as already made by the constitution, when other courts shall be established, or the number of the judicial districts, or the number of the judges in any district, shall be either increased or diminished by legislation under the new constitution. The context of the whole sentence must be taken together. The authority to change the districts or subdivisions here conferred, is coupled with the exigencies which may make it necessary, and upon which alone it can be exercised. And this change, however, could only be made by subsequent legislation, after the general assembly shall have been elected and convened under the new constitution, and then only by the concurrence of two-thirds of the members elected to each house. It would seem to me vain, indeed preposterous, to attempt to maintain the legal existence of Noble county by virtue of this provision in the constitution.

The thirteenth section of the eleventh article of the constitution is as follows: "The general assembly shall attach any new counties that may hereafter be erected, to such districts, or subdivisions thereof, as shall be most convenient."

This provision can have no reference to counties created either before the constitution went into operation, or before it was adopted by the people of the state. Before the 17th of June, 1851, the constitution had no validity. It was nothing more than a proposition submitted to the people for their adoption. By its own terms it did not become the constitution of the state till it had received the sanction of the people at the ballot-box. It was designed to pro-

vide for what should exist or occur under it after it should go into operation. It speaks, therefore, from the time when it took effect as the constitution of the state. The "new counties hereafter erected," to which this section refers, must therefore be those erected after the constitution became operative. It is not pretended that Noble county was erected under the requirements of the present constitution. The thirtieth *section of the second article authorizes the creation of new counties, and prescribes the peculiar mode by which alone they can be made. The thirteenth section above recited must receive a construction with a view to its connection with the other parts of the constitution. And if it be applicable to a new county created before the constitution took effect, the same principle would make the thirtieth section of the second article applicable, and require the erection of the county to be in conformity to its terms.

There is also another part of the constitution, consistently with which I find myself wholly unable to reconcile the existence of Noble county.

The eleventh article of the constitution prescribes the principles and mode for making the apportionment of the state for representation in the general assembly every ten years. And, in accordance with these principles, the seventh section of the article contains the apportionment of the representation in the senate, dividing the several existing counties of the state into thirty-three senatorial districts, for the first decennial period. Also the nineteenth section of the schedule contains the apportionment of the state for the house of representatives, upon the same principles, dividing the counties of the state into representative districts, for the first decennial period. These senatorial and representative districts cover the entire state, are made by classifying or arranging into districts all the existing counties of the state, each and every county in the state being named with reference to its geographical boundaries, and the districts, both for senatorial and for representative purposes, being bounded by county lines. In this apportionment, Noble county is omitted.

The tenth section of the eleventh article contains the following provision: "All territory belonging to a county at the time of any apportionment shall, as to the right of representation and suffrage, remain an integral part thereof, during the decennial period."

Now if Noble county existed "*at the time of the apportionment*"

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458] for the first decennial period, all the territory *belonging to it would remain integral parts of it during that period. It, therefore, becomes a matter of the very first importance to ascertain "*the time*" of *this first apportionment*, within the meaning of the constitution. And what was it? Was it *the time* when, according to the journals of the convention, this apportionment was finally adopted and agreed to in the convention? Was it *the time* when the convention adjourned, and the constitution was signed by the members of the convention? Was it *the time* when the constitution was adopted by the people of the state? Or was it *the time* when the constitution took effect? It could not have been either the time when it was finally adopted in the convention, or the time when the convention adjourned, because at neither of these periods did it become a valid apportionment, or receive such sanction as to make it then, or in future, without further action, the fundamental law of the state. *The time of the apportionment*, within the meaning of the constitution, was clearly *the time* when the making of it was consummated, and it became, without any further action, the valid and binding constitutional apportionment of the state, commencing and operating for the period prescribed by its terms. When it was adopted in the convention, it was not, as yet, a valid apportionment of the state. When the convention adjourned, the constitution had not, as yet, become a binding instrument. It was not, as yet, the constitution of the state. Further action was necessary. The making of the present constitution was the act of the people of the state. The constitution begins by declaring: "We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this constitution." And the 17th section of the schedule provides that the constitution shall be submitted to the electors of the state, at an election to be held on the third Tuesday of June, 1851, and if it shall appear that a majority of all the votes cast at such election are in favor of the constitution, *it shall become the constitution of the State of Ohio, and not otherwise*. The making of the con-

459] stitution was, therefore, *the act of the *people of the state*, and not consummated till their vote in favor of its adoption. The convention was but the *agent* to prepare the terms of the proposition to be submitted to the *principal* for adoption. When the time of the making of a deed is referred to, it is not the time when the attorney or agent draws up its terms upon paper that is meant, but

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the time when the grantor adopts it as his own deed by executing it, and making it a legal and valid instrument.

The constitutions of some of the states did not, by their terms, require the ratification of the people, and were, as it has been said, valid instruments from the time they came from the hands of the conventions in which they were framed. Such was the case with the late constitution of the State of Ohio. It was never submitted to the people of the state for their adoption. There was no provision in it requiring this to be done. It acquired its validity, therefore, from the act of the convention, and became a valid instrument from its date, the time of its final adoption in the convention. But such was not the case with the present constitution of the state. It was not made, and did not become, the constitution of the state, *by its own terms*, until the electors of the state had, in due form, *made it such*, by their adoption at the ballot-box.

"*The time of the apportionment*," therefore, was the time when it became the valid constitutional apportionment of the state. And this was when it was ratified and adopted on the third Tuesday of June. Now, if Noble county ever had any existence as a county, it existed at that time. The consequence was that when the constitution went into operation, on the first day of September, 1851, if the county of Noble continued to exist, it was plainly in violation, either of the provisions of the constitution making the apportionment, and including its territory, as to the right of representation and suffrage, in the different senatorial and representative districts with the four several counties from which it was taken; or in violation of the provision in the tenth section, that all territory belonging to a county, "*at the time of any *apportionment*," [460 shall remain an integral part thereof during the decennial period. If the latter, then the apportionment of the state was imperfect, and the existence of Noble county would deprive the people of the territory composing that county of the constitutional right of representation and suffrage during the first decennial period—a right which the second and third sections of the eleventh article provided that every county of the state should have, in accordance with the ratio of representation therein prescribed. But this is not all. The counties from which the territory and population of Noble were taken, being reduced, would not, on the principle adopted in the constitution, be entitled to the full representation

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given to them severally in the apportionment for the first decennial period.

It is clear that, in the formation of the constitution, no such thing was contemplated as the creation of a new county, between the time of the adjournment of the convention and the time when the new constitution should go into operation. Had such an event been contemplated, as a valid change in the county organizations of the state, it evidently would have been provided for in the constitution. Three several times are all the existing counties of the state named in the constitution, with direct reference to their existing boundary lines. It was the evident intention of the constitution that the judicial districts and subdivisions, as well as the senatorial and representative districts, should all be bounded by county lines, and should include all the counties of the state, at the time when the constitution should go into operation. It is to be presumed that if any change in the county organizations of the state was to be allowed, it would have been provided for. It is true, the constitutional convention had not the power to arrest the exercise of the authority of the legislature, under the former constitution, prior to the time of the new constitution taking effect. But it was sufficient to provide that only such laws as were consistent with the constitution should continue in force.

461] *It is said that the same difficulty will arise whenever any new county may be made under the provisions of the present constitution. This is not correct. The constitution expressly provides for the existence and rights of new counties erected in conformity to its own terms, but it makes no provision for such a contingency as the erection of a new county between the time when the constitution was framed and the time of its adoption.

If the erection of one new county, thereby altering the boundaries of several of the old counties, could have been made between the time when the constitution was framed and the time of its adoption, and continue in force after the constitution took effect; upon the same principle a law passed at *such time* and in the *same manner*, changing the boundaries of all the counties of the state, or repealing all existing counties, and erecting an entirely new system of counties throughout the state, could have been sustained. Suppose, for illustration, that, after the adjournment of the convention, but before the adoption of the constitution, the legislature had passed a law erecting an entire new system of counties throughout

the state, and making the boundaries of all the counties different from what they had been. What would have been the result? Would the purposes of the new constitution have been defeated? Would the election of officers and the administration of the government have commenced under the new constitution with the county organizations as recognized by it, or as changed by the legislature? Would the boundaries of the judicial districts and subdivisions have been changed throughout the state? How could the new counties have been attached to the districts and subdivisions composed of the old counties? Would the election of one part of the public officers have taken place under one set of counties, and the election of other officers under other and different county organizations? Would the judges of the courts of common pleas have been elected and their courts held under one system of counties, and the probate judges, county officers, and justices of the peace have been elected and done business under another [462] and different system of counties? This shows the inconsistency and utter confusion to which the doctrine upon which Noble county is sustained would lead if carried out to the full extent.

Suppose, again, for example, that the legislature had passed a law repealing all the existing counties of the state, between the time of the adjournment of the convention and time of the adoption of the constitution. Would that have defeated the operation of the new constitution? Would that have prevented the election for the adoption of the new constitution? Would the first election for state and county officers under the new constitution have been defeated? Certainly not. The counties, at the time the constitution was framed, with their boundary lines as then existing, and contemplated by the constitution, would have been continued and upheld by virtue of the constitution itself. The constitution contained the elements of vitality within itself, and such repealing law would have fallen by its inconsistency with the constitution, and the counties named in the constitution, and repeatedly referred to in almost every article, would have been continued till changed by legislation in conformity to its provisions.

It is the plain and evident intention of the constitution, apparent from the context of the whole instrument, that the counties of the state, as repeatedly named and recognized in it, and with their geographical limits as existing at the time of its formation, should continue until changed by legislation under its provisions.

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It is said that some local inconvenience and difficulty connected with the public business would have arisen from the abrogation of Noble county by the operation of the new constitution. If the barriers of the constitution are to be broken down, or its provisions frittered away either by strained or loose construction, induced by considerations of convenience or expediency, the people of the state will soon find that the boasted safeguards of their constitution are delusive and inefficient.

463] *THE COMMISSIONERS OF MONTGOMERY COUNTY v. JOHN W. CAREY.

Where a judgment is reversed for error, and remanded for further proceedings, the cause may be taken up, by the court below, at the point where the first error was committed, and be proceeded with, as in other cases, to final judgment.

A party to a statutory arbitration, on a motion for judgment on the award, is not imperatively required by the statute, to prove the execution of the submission, or arbitration bond, but such proof may be waived by the adversary.

The act authorizing and regulating arbitrations requires that causes of objection to judgment upon the award must be made to appear, on oath or affirmation, at the term of the court to which the submission and award are filed.

After the party has interposed his objections, and the litigation thereon has been carried to the court of last resort and decided, it is too late to offer new causes why judgment should not be entered upon the award.

In an arbitration, under our statute, after the arbitrators have been sworn, and the proofs and arguments of the parties have been fully submitted to them, and they have retired for consultation and agreed upon the award, the submission can not be revoked by one party, although the award has not in fact been signed by the arbitrators and delivered to the parties.

CERTIORARI to the common pleas of Montgomery county.

A case between the same parties and upon the same award is reported, 19 Ohio, 245. The case is stated in the opinion of the court.

Haynes & Howard, Holt, and Lowe and Booth, for plaintiffs in certiorari.

Jurisdiction. Swan's Stat. 69, sec. 10; Russell on Arbitration, 627.

When exceptions are filed in time, the court will, on good cause

shown, permit an additional exception to be filed. 1 Pet. Dig. 265; Wash. C. C. 319.

Misbehavior of Arbitrators.

Plews v. Middletown, 6 Ohio, 845; Littleton v. Newton, 9 Dowl. 437; 2 Mann. & G. 351; Stalworth v. Inus, 2 Dowl. & L. 428; Russell on Arb. 443; Darling v. Witchett, Willis, 215; Templeton v. Read., 9 Dowl. 962.

**Davis, Odlin & Lowe, and T. J. S. Smith, for defendant in [464 certiorari.*

The new exceptions are too late. Pedley v. Goddard, 7 Tenn. 73; Freame v. Penniger, Cowp. 23; Conway v. Short, 3 Harr. 342; Russell on Arb. 616; Smith v. Blade, 8 Dowl. 133; Evans v. Howell, 4 Mann. & G. 767; 3 Dowl. 98.

Misbehavior of Arbitrators, 7 Ohio, 113; 2 Johns. Ch. 361; 17 Johns. 416; Kyd. 330; 1 Dallas, 161; 2 Bibb, 456; Smith v. Cutler, 10 Wend. 590.

CORWIN, J. On the 6th day of July, A. D. 1849, the parties interchanged their separate bonds, submitting to the arbitrament of certain arbitrators therein named the claims of said Carey against said commissioners for the construction of a court house for Montgomery county. In pursuance of which submission, as modified by the subsequent agreements of the parties, the arbitrators therein designated met at the city of Dayton, on the first day of November, A. D. 1849, and being first sworn as such arbitrators, commenced the discharge of their duties, and continued their investigations and deliberations, with the aid and assistance of the parties and their counsel, until the 26th day of the same month, when a majority of the arbitrators reduced to writing and signed and sealed and delivered to the parties, respectively, their award, requiring said commissioners to pay to said Carey the sum of \$30,669.33, the balance found due him, and also to pay the costs of the arbitration.

At the April term of the court of common pleas of said county, A. D. 1850, Carey obtained a rule upon said commissioners to show cause why said submission should not be made a rule of court, and judgment be entered on the award; in answer to which, said commissioners assigned for cause: 1. A revocation by them before the award was made. 2. That the award was not according to the submission.

The last objection seems not to have been insisted upon; but the

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465] execution of the submission bond, and of the award *having been admitted by the defendants, the cause was heard upon the first objection assigned, for which the rule was discharged, and judgment entered against said Carey for costs. The proceeding having been removed to the supreme court, on certiorari, was reserved for decision in bank, where, by the decision of all the judges, the judgment of the court of common pleas was reversed.

The cause again came before the court of common pleas of Montgomery county at its November term, A. D. 1850, on a mandate and procedendo from the supreme court; where, on motion of said commissioners, the court granted them leave and further time till the first Monday of March, 1851, to amend their showing of cause, and to file additional reasons against said rule; to which motion and ruling the said Carey objected and excepted. On the 3d day of March, 1851, said commissioner assigned as additional reasons against said rule:

1. A revocation of submission before award made.
2. Gross misbehavior of the arbitrators.
3. Excessiveness and injustice of the award.

At the November term, A. D. 1851, the cause again came on for hearing, on the rule to show cause, and upon the amended showing against it, when Carey offered in evidence the record of the case, embodying all the testimony before the court at the former hearing, to which said commissioners objected. The court overruled the objection and admitted the evidence; to which ruling of the court exception was taken. And upon a full hearing of the whole case, judgment was rendered upon said award in favor of said Carey; to reverse which judgment this writ is prosecuted.

The following errors are assigned:

1. The court erred in admitting the testimony objected to by counsel for the defendants, and in overruling the objection thereto.
2. The court erred in sustaining the motion made by plaintiff's counsel to enter up judgment on said award, and in entering up said judgment against the defendants.

466] *3. Said judgment was entered in favor of the plaintiff, when, by the law of the land, the motion should have been dismissed, and judgment given for the defendant.

It appears from the record that, upon the first hearing of this cause, at the April term, 1850, "the plaintiff, John W. Carey, produced the submission bond marked A, the execution and delivery

of which was now admitted by the defendants. The plaintiff also produced the award dated November 26, 1849, marked B, which was also read in evidence; and it was admitted by defendants that George Jewell, by counsel of parties, was substituted as an arbitrator;" and it also appears from the record, that "George Jewell, being sworn, testified that on the morning of the making of the said award—viz., on the 27th day of November, 1849, about 9 o'clock A. M.—he delivered a copy of said award to Mr. Lamme, one of the commissioners, at the auditor's office."

The preliminary facts necessary to be proven under the twelfth section of our act "authorizing and regulating arbitrations," were sufficiently established by the admissions of the parties and by the testimony of Jewell, all of which were made matter of record, and constituted a part of the record sent down with the procedendo from the supreme court. And we are all of opinion that the judgment of the court of common pleas, having been reversed for an error committed at a subsequent stage of the proceedings, the cause may be taken up by the court below at the point where the first error was committed, and proceeded with, as in other cases, to final judgment, and that it was not necessary, upon such further hearing upon procedendo, to introduce new and other proof of what was thus ascertained from the record. The proof required by said section, like any other necessary proof, may be waived by the admissions of the adverse party; and so far as the first assignment goes, we see no error in the ruling of the court of common pleas, but think the record was properly admitted to show that these facts were already established in the case.

*But it is complained that, upon the final hearing in the [467 court below, the new causes of objection to judgment upon the award, filed March 3, 1851, were disregarded. And this leads us to consider at what time such objections must be interposed, under our statute, the eleventh section of which is in these words:

"That if any legal defects appear in the award, or other proceedings, or if it shall be made to appear, *at the term of the court at which said award and arbitration bond are entered* in said court, on oath or affirmation, that said award or umpirage was obtained by fraud, corruption, or other undue means, or that said arbitrators or umpire misbehaved, said court may set aside such award or umpirage, or make such order thereon as may be just and right."

This section admits of but one reading. Although defects ap-

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parent in the award or other proceedings may be taken advantage of at any time before final judgment, yet, to authorize the court to set aside the award, on account of any of the extrinsic causes of objection specified in the section, they must be made to appear, on oath or affirmation, at the term of the court to which the award and arbitration bond are entered. These new causes of objection never were interposed "*upon oath or affirmation,*" as the statute requires they shall be done, before the court can have power to act upon them; and were not only not "made to appear at the term of the court to which the award and arbitration bond were entered," but were not presented until after the party had made his defense, and the litigation thereon had been carried to the court of last resort, and finally decided. If a new defense might thereafter be allowed, and the judgment of the court of common pleas were here again reversed, another defense might again be set up, and thus the litigation be made interminable, the beneficent policy of our arbitration would be effectually defeated, and its plainly expressed provisions clearly violated. We think, therefore, that the court of common pleas committed no error in refusing to discharge 468] the rule on account of the new reasons filed *after the cause had been sent back on *procedendo*. And this construction of the statute renders it wholly unnecessary to consider the testimony by which those reasons are sought to be supported.

The only remaining question arises upon the cause first assigned against the rule, to wit, that, before the award was made, the submission was revoked by said commissioners. This precise question was decided in a case between the same parties, 19 Ohio, 245, where it was held "that the right to revoke the submission did not exist when the attempt was made to exercise it;" and we see no reason to depart from the construction of our statute adopted by the court in that case. Here, the parties had fully and fairly submitted their controversy to arbitration under the statute; all the proofs and arguments had been fully and patiently heard; the deliberations of the arbitrators had been continued for nearly one month, and an award had been substantially agreed upon; and then the commissioners of the county were secretly informed by one of the arbitrators of the conclusions to which a majority of the board had arrived. A deed of revocation was made out by the commissioners, and placed in the hands of the auditor, who was not to serve the same, and did not serve it, until an attempt was

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made to induce the arbitrators to change the award, and until he was notified by the minority that they could not get the award to suit them.

To allow a revocation by one party, at such a time, and under such circumstances, instead of accomplishing the object of an arbitration law—the speedy and final adjustment of the controversies of parties, by a tribunal amicably constituted for that purpose—would make it a mere means of mischief, trickery, and fraud. We are entirely satisfied with the ruling of our predecessors in the case above referred to, and the judgment of the court of common pleas is therefore affirmed, with costs.

RANNEY, J., and THURMAN, J., dissented upon the last point.
Judgment affirmed.

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H. mortgaged land to T. and afterward sold it to O., and received payment. H. informed T. of the sale, and in order to remove the incumbrance, as he was bound to do by his contract with O., he proposed to give a new note for the debt, with a mortgage on real estate to secure it, to which T. consented, and the new note and mortgage were accordingly executed and delivered—T. agreeing not to prosecute the first mortgage if the property covered by the second was sufficient to pay the debt. The property was amply sufficient, but T. neglected for sixteen months to deliver the mortgage for record, by means whereof the property was swept away under mortgages and conveyances made by H. within that period.

Held, that under these circumstances O.'s land was discharged from the lien of the first mortgage.

BILL of review brought to reverse a decree in the late supreme court of Hardin county. The facts appear in the opinion of the court.

Marsh, for complainant, cited *Peter v. Beverly*, 10 Peters, 532; *Jowes v. Shawhan*, 4 Watts & S. 463.

Stillings, for defendant, cited *Aldrich v. Cooper*, 8 Ves. 381; 1 Story Eq. 499.

THURMAN, J. John M. Holmes purchased of John Ross a quar-
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ter section of land in Hardin county, and paid all the purchase money except \$100. Being thus seized of an equitable estate, and entitled, upon payment of said sum, to a conveyance in fee of the legal title, he, on October 21, 1841, conveyed the premises by mortgage deed in fee to the complainant, Teaff, to secure the payment to Teaff of \$351 that day borrowed of him, and to indemnify him against loss by reason of his having become Holmes' security upon a note of \$100 to one Wilson, and to secure any future loans or advances Teaff might make to him, and any other indebtedness he might incur to Teaff, together with any costs or charges the latter might be put to in the collection of the moneys thus secured. This mortgage was delivered for record October 30, 1841. On 470] *April 13, 1845, Holmes sold the premises to Jacob E. Osborn for \$1,150.

On September 19, 1846, Teaff and Holmes had a settlement, when the latter, to secure the amount of his indebtedness as then found, executed to the former a judgment note under seal, at twelve months, for \$735, with a mortgage in fee on certain real estate in the town of Kenton.

This mortgage was not delivered for record until January 28, 1848. In the meantime Holmes incumbered portions of said town property by other mortgages, and sold and conveyed other portions of it in fee simple. The property at the date of said second mortgage to Teaff was amply sufficient security for his claim; but by his neglect to record, the greater part of the property was swept away by the subsequent mortgages and deeds, and the security thus became largely inadequate.

On September 21, 1848, Teaff filed his bill in Hardin common pleas, on his first mortgage, to foreclose the equity of redemption, and have a sale of said quarter section for the satisfaction of his demands. To this bill he made Holmes, Ross, and Osborn defendants; and after setting forth the execution and terms of the mortgage, averred that said \$351, for which Holmes, at the time of executing the mortgage, had given his note under seal, remained due with interest; that he had been compelled to discharge the Wilson note, and had not been refunded; that afterward, on September 19, 1846, upon a settlement between him and Holmes, the latter fell in his debt \$735, on account of the above and other matters, for which sum said note, under seal of that date, was given, payable at twelve months, and that the same remained unpaid; that Osborn was in

possession of the land, claiming to have purchased it from Holmes, but that if any such purchase had been made, it was with full knowledge of complainant's rights, and that no notice of the purchase was given to him by Osborn, or any one for him, until after he had advanced his money and sold his goods to Holmes on the faith of said mortgage. The defendants were required to answer the bill under oath.

*Holmes answered, admitting the execution of the mortgage, but denying that it remained in force. On the contrary, he averred that the note for \$735, with the mortgage on the Kenton property, was given and accepted in satisfaction of all complainant's claims upon him, and in discharge of the mortgage in the bill mentioned; and this was done pursuant to a proposition made by him to complainant, after representing to complainant that he had sold the land to Osborn, and received his pay; that complainant, after accepting and receiving the \$735 note, and the Kenton mortgage, fraudulently refused to release the first mortgage, and the securities therein mentioned.

He further answered, that he had sold to Osborn, and had received full payment; that when he sold, he told Osborn of the mortgage held by complainant, and promised to have it released as soon as he could do so.

Osborn answered, among other things, that he had purchased the land of Holmes, April 13, 1845, and paid for the same between that date and December 15, 1845, and that he has been in the exclusive possession thereof ever since May 17, 1845. Denies that the mortgage in the bill mentioned, or the notes in said mortgage specified, are unpaid; but, on the contrary, avers that said notes were paid by Holmes, September 19, 1846. Denies that the \$735 note was executed as evidence of the balance due on said mortgage, and says it was a separate transaction, and secured by the Kenton mortgage. Avers that complainant had notice, both before and at the time of the execution of the \$735 note, of his (Osborn's) purchase of the land.

Ross, also, put in an answer, but it is unnecessary to refer to it.

To the answers of Holmes and Osborn, the complainant replied, and the cause went to trial in the common pleas, upon the pleadings and testimony. The court decreed a dismissal of the bill, and the complainant appealed.

In the supreme court, Osborn, by leave, filed an amended answer,

472] in which he stated that he purchased the land for *\$1,150, which he paid as follows : \$600 in October, 1845 ; \$400 in December, 1845 ; \$50 in February, 1846, and \$100 to the fund commissioners of Hardin county, at a date not stated ; that he had made full payment by February 1, 1848. That when he purchased, Holmes was in good circumstances and responsible for all his liabilities, and was the owner of a large amount of unencumbered real estate ; that at the several times of the making of said payments, Holmes agreed with and assured him, that if complainant's mortgage was a lien on the land, he, Holmes, would settle "the same," and that he would, as soon as he could, go to Steubenville, and have the mortgage debt paid, and the mortgage released. Repeats his denial that the \$351 note and the Wilson claim remain unpaid, and avers that Holmes, to complete his agreement with respondent, and free him from all risk of loss, went to Steubenville to settle said mortgage and have the same released ; and that, on September 19, 1846, in furtherance of said agreement and purpose, Holmes proposed to, and agreed with complainant to settle said mortgage and notes, together with all claims which the complainant held against him, and to substitute for said mortgage another mortgage on real estate in Kenton, which town property was then worth \$1,500. That, pursuant to said agreement, Holmes executed, and complainant received said \$735 note and Kenton mortgage. Avers that complainant then knew that respondent had purchased and paid for said quarter section, and denies that it was intended that \$735 should be secured by said first mortgage. Further answering, says, that knowing said town property to be an amply sufficient security, and supposing the first mortgage to be discharged, and having paid all the consideration of his purchase from Holmes except \$100 due the fund commissioners of Hardin, he and Holmes on November 5, 1846, destroyed all the original papers made at the time of the purchase, and in lieu of the title bond Holmes had executed to him, he took an assignment of the title bond Ross had executed to Holmes. Avers that complainant, by neglecting to deliver the Kenton mortgage 473] gage *for record until January 28, 1848, over sixteen months after its execution, lost nearly all the security afforded thereby, Holmes having in the meantime mortgaged and conveyed the property to other persons.

Further avers that said Kenton mortgage included nearly all the property Holmes owned out of which said debt could be secured

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by Teaff, or by respondent, if respondent had paid Teaff's claim; and that respondent was disabled from paying the debt and indemnifying himself out of said property by the extension of twelve months given by Teaff to Holmes for payment. Avers that Holmes, about 1847, became wholly insolvent, and his property has been sold, or covered by mortgages, so that it has become impossible for either Teaff or respondent to secure said debt.

Sundry depositions having been taken and other evidence put in, the supreme court, upon hearing the cause, rendered a decree dismissing the bill; to reverse which decree the present suit is prosecuted. The errors assigned are:

1. That the court erred in finding that the equity of the case was with the respondents.
2. The decree is in favor of the respondents, when it should have been in favor of the complainant.

The testimony does not, in our opinion, show that the mortgage in the bill mentioned was satisfied and discharged by the \$735 note and the Kenton mortgage; but it does show, we think, that the complainant knew, when he took said note and second mortgage, that Holmes had sold the quarter section of land to Osborn, and that Holmes' object in giving the new note and mortgage was to protect Osborn against the first mortgage. And we think it is further proved that the complainant expressly agreed not to prosecute the first mortgage, if the property included in the second was sufficient to pay his claims. The witness, Bickerstaff, so swears; and testifies that the agreement was reduced to writing, attested by him as a witness, and left, according to his impression, with one of the Messrs. Dillon. One of these gentlemen, Moses Dillon, testifies that he has no knowledge of any such paper; and though [474 he has searched for it among his papers, can not find it. The other Dillon was not examined. As this paper was the highest evidence of the agreement, it ought to have been produced, if required, or sufficient proof made of its loss, in order to let in secondary evidence of its contents. But it was competent for the complainant to waive the objection and permit the secondary proof to be received, and we must presume that he did so, as it nowhere appears in the case that he objected to it, and its admission is not assigned for error in the bill of review. Bickerstaff's testimony is not contradicted, but, on the contrary, is corroborated, as we think, by the circumstances of the case. It is also, in our opinion, sufficiently

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established that the property covered by the second mortgage was much more than sufficient to secure the complainant's claim, and that he lost that security by his own inexcusable delay for sixteen months to deliver the mortgage for record; whereby the property was swept away by other creditors and grantees of Holmes. Holmes having become insolvent, the question is, who, under these circumstances, must be the loser, Teaff or Osborn? The court below decreed that Teaff must lose. If we reverse the decree, we decide that Osborn must be the loser. For Osborn has paid for the land; and, although there is some discrepancy between his two answers on this point, yet it is well enough established that he had paid much the greater part of the consideration of his purchase before September 19, 1846; and that, if any part of it remained due when complainant's original bill was filed, it was only the \$100 due the fund commissioners of Hardin, and for which they held a paramount lien on the land. Now, without recurring to the general principle that the holder of two securities for the same debt is not permitted, at his pleasure, by a release of one of them, to cast the whole burden of his claim upon the other, to the prejudice of a third person, who has obtained rights to the latter from the debtor; but, confining ourselves to the contract of the parties, and the law arising upon it, can there be a doubt how this case ought to be

475] *decided? It was perfectly lawful for Teaff, in consideration of receiving the \$735 note and the Kenton Mortgage, to stipulate as he did, not to prosecute the first mortgage if the Kenton property was a sufficient security. Such a contract was valid and might have been enforced even as between him and Holmes, if the latter had not destroyed the security by his own acts. But Teaff, when he made the contract, knew that its object was to free the land which Osborn had purchased. Could he, with this knowledge, securely take his own time to record the Kenton mortgage? Had he a right to delay its delivery to the recorder sixteen months, and, by so doing, let the property be taken under subsequent mortgages and grants? We think not. If, instead of the mortgage, Holmes had indorsed to him, as collateral security, notes on solvent persons, and he had neglected to collect them when he might have done so, and the makers had become insolvent, it is well settled that he would be held to have made the notes his own, and that they would be treated as payment. So in this case his gross neglect has lost him an amply sufficient security for his debt; and it would be a

plain violation of both legal and equitable principles to suffer him to take advantage of his own laches to enable him to do what he had expressly contracted he would not do.

But, independently of the agreement, we should come to the same result. The complainant had two properties in security for his claim, in one of which he knew Osborn had become interested. Could he, knowing this, release or destroy the other security, and coerce payment of his whole demand out of Osborn's land? The authorities decisively answer this question.

In *Cheeseborough v. Millard*, 1 Johns. 409, it was held that, "if a creditor has a lien on two different parcels of land, and another creditor has a subsequent lien on one only of these two parcels, and the prior creditor elects to take his whole demand out of the parcel of land on which the subsequent creditor has his lien, the latter is entitled either to have the prior creditor thrown upon the other fund, or to have the prior lien assigned to him for his benefit. [476] So, if a creditor by bond exacts the whole of his demand from one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities, as if he were a purchaser, either against the principal debtor or his co-sureties. And if the prior creditor has put it out of his power to make the cession, it seems that he will be excluded from so much of his demand as the surety or subsequent creditor might have obtained if the cession could have been made."

These principles cover the whole case before us; for it will not be denied that a subsequent purchaser of the fee, absolutely, stands in as good a condition as a subsequent mortgagee. They are both purchasers, and their equities, as against the paramount incumbrance, are equal. Nor can it be gainsaid that where the creditor who has the securities suffers one of them by his laches to become valueless, he is in no better position than if he had released that security. Here, then, if the Kenton mortgage were valuable, Osborn would, upon the principle of the case just cited, have a right to require Teaff to resort to it first, or at least to assign it to him, Osborn. But it has become worthless owing to Teaff's failure to record; and he has, therefore, no right to offer a cession of it to Osborn; and, as it was more than sufficient to satisfy the debt, there is no longer any right to resort to Osborn's land for payment.

Stevens v. Cooper, 1 Johns. 425, was a case in which a mortgage of six lots was given to secure a debt. The mortgagor subsequently

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sold the lots, separately, to different persons. After this the mortgagee released four of the lots from the lien of the mortgage. The question that arose was, whether, under these circumstances, he could have payment of his whole demand out of the remaining two lots. It was decided that he could not; that these lots could only be charged with a rateable proportion of the debt. Had the release of the four lots taken place while they yet remained the 477] property of the mortgagor, but after the sale of *the two lots, and had the four lots at the time of the release been amply sufficient to pay the debt, then, if the release was given with knowledge that the two lots had been sold and paid for, there can be no doubt but that the chancellor would have held the two lots to be wholly freed from the mortgage. The principle upon which his decision went would have required him so to hold.

So, in *Johnson v. Rice*, 8 Greenl. 157, it was decided that if the mortgagor alien the land in severalty to divers purchasers, and the mortgagee, knowing this, release to one of them, without the assent of the others, his lien is, *pro tanto*, extinguished.

So, if Teaff had recorded the second mortgage in time to make it a paramount lien on the Kenton property, and had afterward released to the subsequent purchasers from Holmes, it might be, independently of his agreement, that he could resort to Osborn's land for a rateable proportion of his claim; but, by his failure to record and obtain the paramount lien, when he might have done so, he has lost this right. For had he thus obtained the paramount lien, he would have had an ample security, to which Osborn could have compelled him first to have recourse; but by his own inexcusable fault, he has deprived Osborn of this right; and he ought, therefore, to sustain the loss, rather than that Osborn should be prejudiced by his neglect.

These views render it unnecessary to consider what effect, if any, the extension to Holmes, of time for payment, had upon the rights of the parties.

We are satisfied that the decree of the supreme court was entirely correct; and the bill of review must, therefore, be dismissed.

Bill dismissed.

***CARLISLE B. WILLIAMS ET ALS. v. THE FIRST PRESBYTERIAN SOCIETY OF CINCINNATI ET ALS. [478]**

A dedication by the original proprietors of a town, of a parcel of ground therein, for public uses, is valid, although they held but an equitable estate in the premises; and their trustee, holding but a naked legal title for their use, is bound to respect such dedication.

Such dedication, made before any legislative act required town plats to be recorded, is valid without such record.

And it is valid, although there was no grantee *in esse*, when it was made, capable of taking the fee.

Property dedicated to public uses, without any provision for a forfeiture, does not revert to the dedicators, upon a misuser of it. It is only when the uses become impossible of execution that it can revert.

The right of a county or town to property thus dedicated may be barred by the statute of limitations, or lost by lapse of time.

So may a right of the dedicators to enforce a specific execution of the purposes of the dedication.

Such dedicators have not, by mere operation of law, exclusive of any provision in the act of dedication, a visitatorial power.

Under the territorial law of December 6, 1800 (1 Chase, 291), a stranger was not authorized to make a town plat, and cause it to be recorded, unless the original proprietors were dead, or had removed from the territory.

Where a trustee, with a knowledge of his *cestui que trust*, makes a conveyance apparently in derogation of the trust, and undisturbed possession is held and improvements made during a long period, *e. g.* fifty years, by the grantee and those claiming under him, in which period no claim is asserted by the *cestui que trust*, it may be presumed that he, for a sufficient consideration, directed or acquiesced in the conveyance.

Although it is true, as a general rule, that, as between trustee and *cestui que trust*, lapse of time is no bar, yet it is equally true that where the former, with the knowledge of the latter, disclaims the trust, either expressly or by acts that necessarily imply a disclaimer, and an unbroken possession follows in the trustee, or those claiming under him, for a period equal to that prescribed in the act of limitations to constitute a bar, such lapse of time, under such circumstances, may be relied upon as a defense.

A tenant in common, whose rights may be vindicated by his separate action, is not protected against the statute of limitations, or lapse of time, by a disability of his co-tenant.

Where time begins to run against the ancestor, it continues to run against the heir, although the latter is an infant. This is the universal rule in respect

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to the statute of limitations, and the general rule in equity, when lapse of time is relied on as a bar.

Lapse of time, appearing by the bill, may be taken advantage of upon demurrer.

479] *There are cases of fraud that render the defense of lapse of time unavailable; as where a person has been misled by the misrepresentations or practice of his adversary, or kept in ignorance of his rights by one who ought to have disclosed them; but such fraud must be specially averred. The general averment of combination and confederacy is insufficient, even upon demurrer.

It is a rule in equity, as well as at law, that if a pleading admits of either of several constructions equally well, that construction is to be adopted which is least favorable to the pleader.

Where a legal estate is granted or devised to trustees without words of perpetuity upon trusts of perpetual duration, there is much reason and authority for holding that the legal estate taken by the trustees is commensurate with the trust, and, therefore, a fee. *Miles v. Foster*, 10 Ohio, 1, which seems to recognize a contrary doctrine, doubted.

But wherever the legal title goes upon the death of the grantee or devisee, it remains charged with the trust.

And even if the trustees do not take a fee, yet, if the trust is created by deed, containing a covenant of general warranty, binding the grantor and his heirs forever, such deed may operate by way of estoppel, to confirm to the beneficiaries of the trust the perpetual and beneficial estate in the land.

A deed to certain persons, as "Trustees of the Presbyterian Congregation of Cincinnati, and their successors forever," "for the use, benefit, and behoof of the aforesaid congregation forever," there being then but one such congregation, is not void for uncertainty as to the beneficiaries of the trust, although they were not then incorporated.

Where a deed was evidently designed to convey a fee, a court of equity will not lend itself to defeat the intent. If it would be reformed in equity, no person who would be bound by it when reformed can found an equity upon its defects.

Where a bill charges, upon the complainant's information merely, that a certain fact exists, its existence is not admitted by a demurrer.

Where there is equity against equity, the rule "prior in time, stronger in right," does not prevail if the prior equity has become stale, and the subsequent equity has not.

THIS is a suit in chancery reserved in Hamilton county.

The complainants, by their bill, filed October 2, 1848, set forth that Matthias Denman was one of the associates of John Cleves Symmes in the purchase from the government of the lands known

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as "Symmes' Purchase;" that it was agreed, among the associates, that "each was to be at liberty to select for his own use a certain portion of the lands purchased, on payment at the rate and terms contracted for;" *that Denman, accordingly, in the summer [480 of 1788, selected for his own use the land opposite the mouth of the Licking river, on which land the town of Losantiville was laid out the next year, which selection was approved and confirmed by Symmes and his associates; that, on August 25, 1788, by a written agreement of that date, Denman sold two undivided thirds of said land to Robert Patterson and John Filson, for twenty pounds, Virginia currency, to be paid upon his "producing indisputable testimony of his, the said Denman's, indisputable right and title to the said premises;" that, in September, 1788, Filson was killed by the Indians; that no town had been laid out on the premises, nor had Filson paid said £20, or any part thereof; that Denman afterwards produced to Patterson and Filson's heirs indisputable evidence of his title, and demanded a compliance with the terms and stipulations of the aforesaid contract; but they wholly neglected and refused to comply therewith; and thereupon the contract, so far as it had respect to Filson and his heirs, was put an end to, and deemed by Patterson and Denman to be no further binding on them or their heirs; that some time thereafter, the precise time not known, Col. Israel Ludlow, by the mutual consent of Denman and Patterson, succeeded to the share which had been forfeited by Filson and his heirs, as aforesaid, and paid to Denman said £20, and became entitled, in the place of Filson, to an undivided third of the tract of land selected by Denman, as aforesaid; that in the forepart of 1789, the proprietors laid out, on said tract, a town which they called Losantiville, which name was afterwards changed to Cincinnati; that the streets, alleys, and lots thereof were marked, and a plat or map of the town made out by the proprietors, on which the name and width of the streets and alleys were noted, the lots numbered, and eight of them, to wit, in lots Nos. 114, 115, 116, 117, 139, 140, 141, and 142, designated as reserved for a court-house, a jail, a church, and school; that said map was afterward lost or destroyed by some person or persons unknown; that, on May 22, 1790, Denman caused an entry of said tract to be made in his own *name, in the book of entries kept in the office, opened by [481 Symmes for that purpose, which entry, complainants charge, inured to the benefit of Denman, Patterson and Ludlow, as partners and

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joint proprietors as aforesaid, so as to invest them with the complete equitable title; that on September 30, 1794, the lands known as Symmes' Purchase were patented to Symmes by the government, whereby, as complainants aver, he became seized in fee of the legal title to said tract, selected and entered by Denman, as a trustee in trust for Denman, Patterson and Ludlow, their heirs and assigns, and for no other use or purpose whatever; that, on November 6, 1794, Patterson sold and conveyed all his title and interest in and to said town of Cincinnati to Samuel Freeman in fee simple, who, on March 4, 1795, sold and conveyed the same, in fee simple, to Joel Williams, the ancestor of complainants; that on the same 4th of March Denman sold and conveyed his undivided third of said town to said Joel Williams, by a deed which describes Williams as of Cincinnati aforesaid; by means of which conveyances, complainants aver that said Williams became seized in fee simple of the equitable title to two undivided third parts of the eight lots aforesaid, the equitable title to the remaining third being in Ludlow; that on December 28, 1797, Symmes conveyed four of said eight lots, to-wit, Nos. 114, 115, 139 and 140, to Moses Miller, John Ludlow, James Lyon, William McMillen, John Thorp, David E. Wade and Jacob Reeder, trustees for the Presbyterian Congregation of Cincinnati and their successors forever, "for the use, benefit and behoof of the aforesaid congregation forever," with covenants of seizin, power to sell and convey, and general warranty; the last being that he and his heirs would warrant and forever defend the premises unto the said trustees and their successors, against all lawful claims and demands whatsoever: that complainants have heard, and so charge that the consideration, sixteen dollars, mentioned in this deed, was never paid, and that the grantees had, at and prior to its execution and delivery, notice and knowledge of the equities 482] of Williams and Ludlow; and *further, that said trustees were unincorporated, and therefore incapable of transmitting an estate by succession; for which reason they took only a life estate in the premises, which terminated on the death of David E. Wade, the last survivor of them, on July 23, 1842; that, on May 24, 1798, Symmes conveyed the remaining four lots, viz., Nos. 141, 116, 142 and 117, to Robert McClure and John McCullough, "trustees and agents for the body of the people within the county of Hamilton," "in trust for the uses and purposes thereof, intended by the people of the said county of Hamilton," "together with all and singular

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the appurtenances to the same four lots belonging, or in any way appertaining, for public purposes, and for the use of the people of the county of Hamilton; to have and to hold the said four lots of land in trust to the said Robert McClure and John McCullough, as trustees for said county of Hamilton, to the only proper use, benefit and behoof of the good people of said county of Hamilton, for all public purposes," which deed contains covenants of seizin, and power to sell and convey, and a covenant, with said McClure and McCullough and their heirs and successors, to warrant and forever defend the premises. That, as complainants are informed and charge, the consideration, four dollars, mentioned in this deed, was never paid; and that at and prior to its execution and delivery the grantees had notice and knowledge of the equities of Williams and Ludlow; and complainants further charge that a title in fee did not pass to McClure and McCullough, but only an estate for life, which terminated on the death of McClure, the last survivor, on September 21, 1820.

That, on December 6, 1800, the territorial legislature passed "an act to provide for the recording of town plats," 1 Chase, 291, which took effect from and after May 1, 1801. The first section of this act required the original proprietor or proprietors of each town theretofore laid out, except vacated towns, to cause a true map, or plat thereof, to be recorded in the recorder's office of the county in which the town lay, within one year from the taking effect of the act, and imposed penalties for a refusal or neglect to do so.

*The second section provided: "That where the proprie- [483] tor or proprietors, who have laid out any town, are dead or removed from the territory, it shall be lawful for any person whose information may enable him to do it to make a plat of such town, and to appear before a justice of the peace, or a justice of the court of common pleas of the county where such town lies, or before a judge of the general court of this territory, and make oath that the same is a true and accurate map or plat of such town, or shall otherwise prove the truth and accuracy thereof, to the satisfaction of such judge or justice; such map, so proved and certified by the judge or justice taking such probate, under his hand and seal, may be admitted to record; and, after the same is recorded, if the proprietor or proprietors, his, her, or their heirs, executors, or administrators, will controvert the truth or accuracy of such re-

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recorded map or plat, the *onus probandi* shall rest on him, her, or them."

Section 3 required plats of such towns as might thereafter be laid out to be recorded. And section 4 provides: "That such maps or plats as are required by this law to be recorded shall particularly set forth and describe all the public ground within such town, by its boundaries, courses, and extent, and whether it be intended for streets, alleys, commons, or other public uses; and all the lots intended for sale, by progressive numbers, and their precise length and width; and the map, so made and acknowledged before a justice of the peace, or justice of the common pleas of the proper county where the town lies, or before a judge of the general court, or being made and proved agreeably to the provisions contained in the second section of this act, and certified under the hand and seal of the judge or justice taking such acknowledgment or probate, and recorded, shall be deemed a sufficient conveyance to vest the fee of such parcels of ground as are therein expressed, named, or intended to be for public uses, in the county in which such town lies, in trust to and for the uses and purposes therein named, expressed, or intended, and for no other use or purpose whatever."

484] *The complainants further allege that the original plat of Cincinnati having been lost or destroyed as aforesaid, prior to the passage of said territorial law, a new map or plat of the town was made by the then proprietors, or a majority of them, which was not only made out in accordance with the old plat or map, but also in accordance with the requirements of said act; on which map, so made out by the then proprietors, or a majority of them, as last aforesaid, the said eight lots were colored red, and the said proprietors, in writing, on the face of said map, expressly declared that "the lots colored red are reserved for a court-house, a jail, a church, and a school." That, on April 29th, 1802, at Cincinnati, this map was duly proved before Samuel Robb, one of the judges of the court of common pleas of said county, and likewise one of the justices assigned to keep the peace in and for said county, to be a true and accurate map or plat of the said town of Cincinnati, agreeably to the original plat, plan, design, and intentions of the three proprietors, in manner and form as the same was originally laid out and declared by them, which probate the said Robb, judge and justice, as aforesaid, certified under his hand and seal; and said map or plat was, on the same day, duly admitted to record,

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pursuant to the act aforesaid. The probate aforesaid is exhibited with the bill, and is in these words:

"Territory of the United States northwest of the river Ohio, Hamilton county, ss.

"Be it remembered, that on this twenty-ninth day of April, in the year of our Lord 1802, at the town of Cincinnati, in the county and territory aforesaid, personally appeared before me, Samuel Robb, one of the judges of the court of common pleas, and likewise one of the justices assigned to keep the peace in and for said county, Joel Williams, of Cincinnati aforesaid, who, being duly sworn, maketh oath and saith that John Filson, one of the original proprietors of said town of Cincinnati (formerly called the town of Losantiville), is, as this deponent is informed and believes, dead, and that Matthias Denman and Robert Patterson, the two other original proprietors of said town, as this deponent is informed and verily believes, do not reside, and are not now within, and for a long space of time have not been in, this territory aforesaid, and have, as this deponent believes, no intention of recording in person the plat of said town, agreeable to a late act of said territory, entitled *'An act to provide for the recording of town plats;' and [485 this deponent further saith that he possesseth, as he believes, sufficient information in the premises to enable him to make a plat of said town of Cincinnati, agreeable to the original plat, plan, design and intentions of the aforesaid original proprietors of said town, in manner and form as the same was originally laid out and declared by the proprietors aforesaid; and this deponent further saith, that the within is a true and accurate map or plat of said town of Cincinnati, agreeable to the original plat, plan, design and intentions of the three proprietors aforesaid, in manner and form as the same was originally laid out and declared by the proprietors aforesaid. In witness of the above, I do hereby certify, under my hand and seal, that the above deposition of the said Joel Williams was duly signed and sworn to, on the day and at the place above mentioned."

"JOEL WILLIAMS."

"Before me, SAMUEL ROBB. [Seal.]"

And complainants charge that, in virtue of the premises, the said county of Hamilton became seized in fee simple of the equitable title to said eight lots, "in trust to and for the use of a court house, a jail, a church and a school, and for no other use or purpose whatever."

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And they aver that, at the time of the probate and record of said plat, said Joel Williams was the proprietor and owner of two undivided third parts of the property in Cincinnati which had not been previously sold by the proprietors of said town. That said Israel Ludlow died on or about January 7, 1804, leaving certain children, who are named, and that a posthumous son was born to him in May of that year. That, on or about March 10, 1814, John C. Symmes died. That, on or about October 29, 1824, said Joel Williams died, leaving certain children, two of whom, to-wit, the complainants, Joel Williams and Eleanor S. Pickett, then Williams, did not attain their majority until September 28, 1828. Complainants aver, "that for a long time after attaining their majorities, they remained misinformed as respects the aforesaid dedications, and of the diversion thereof to purposes not contemplated by the proprietors." They have heard and charge "that their said ancestor was prevented from interposing a check to the first erection of buildings in the dedicated property, not contemplated by the pro-486] prietors in making the dedication, in *consequence of the minority of Ludlow's heirs, the youngest of whom, to-wit, the said Israel Ludlow, did not attain his majority until May, 1825, several months after the decease of the said Joel Williams, as aforesaid."

The complainants further say that they "had well hoped that the said county of Hamilton, by the commissioners of said county, or by others duly appointed for that purpose, would faithfully and honestly have executed the trust and confidence reposed in them in and by virtue of the aforesaid act of the territorial legislature, to provide for the recording of town plats; and the proprietors of the town of Cincinnati, in making the said dedications as aforesaid, by preventing the erection of any other buildings on said lots, except a court-house, a jail, a church and school."

"But now, so it is, may it please your honor, the good people of the said county of Hamilton, entirely disregarding the trust and confidence reposed in them as aforesaid, combining and confederating with the defendants hereinbefore and hereafter named, or those under whom they or some one or more of them claim, and with others to your orators unknown (whose names, when discovered, they pray may be inserted herein as defendants, with proper and apt words to charge them and every of them) have diverted, or permitted the diversion of said property to purposes not contemplated or intended by the said proprietors of the said town of Cincin-

nati in their said act of dedication ; but contrary to the express declaration, and entirely inconsistent with the benevolent intentions of the said proprietors in making said dedication, they have erected or permitted private and public buildings to be erected on all of said lots, none of which are intended to be used either for a court-house, a jail, a church, or school ; but to be occupied for secular, private and improper purposes, to-wit, for making and vending patent medicines, lawyers' offices, tailors' shops, dry goods stores, millinery stores, book stores, dentists' offices, liquor stores, dram shops, alias coffee houses, printing offices, confectionaries, jewelry shops, dwelling, and divers other private and *se- [487 cular purposes, none of which are for either of the purposes, designated by the said proprietors of the said town of Cincinnati in their aforesaid dedication, or within the intent and meaning thereof, but in utter violation and against the spirit and meaning thereof, and contrary thereto." That they have permitted persons, " under the name and style of Trustees of the First Presbyterian Congregation in Cincinnati, and those under whom they claim to have derived title, to enter upon, occupy, and appropriate to their own use, make leases, and perform other acts of ownership, to the entire exclusion of all other religious societies or churches of professing christians, certain portions of the property dedicated as aforesaid ; all which acts are also inconsistent with, and contrary to, the intentions of said proprietors of the town, as declared in their said act of dedication. And they, the said good people of the county of Hamilton, have also permitted the erection of buildings in part of the said dedicated property, erected ostensibly for educational purposes, to be used and occupied for purposes wholly inconsistent with, and contrary to, the purposes for which said dedication was made."

That complainants have, in a friendly way, requested the removal of every building so improperly erected, in order that the purposes of the dedication might be carried into effect ; but the people of said county have wholly neglected and refused to comply with such request.

"And your orators aver that each and every individual and body politic and corporate hereinafter named as defendants, at and prior to his, her, or their payment of the purchase money, or receiving a conveyance of any portion of the dedicated property, had notice and knowledge of the special purpose for which the dedication

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aforesaid was made; that the conveyance respectively made to him, her, or them, was contrary to, and in violation of, the trust and confidence reposed in the said good people of the county of Hamilton; that the legal title in fee was outstanding in the heirs and representatives of the said John C. Symmes, deceased, in trust as 488] aforesaid; that the said Joel Williams, deceased, and *the said Israel Ludlow, deceased, were, at the time of said dedication, the sole proprietors and equitable owners of said dedicated property; he, the said Joel Williams, being the owner of two undivided third parts thereof, and the said Israel Ludlow the remaining third part; and that your orators, and the heirs aforesaid of the said Israel Ludlow, deceased, were entitled, in the proportions aforesaid, to the remaining interest and estate in said dedicated property, in case of forfeiture, consequent upon the diversion of the dedicated property to purposes inconsistent with, and contrary to, the true intent and meaning of the said dedication. And, in case there was no forfeiture of title, in consequence of the diversion of the said dedicated property to objects and purposes not contemplated by the said proprietors, that your orators had a right to the aid and assistance of this honorable court, sitting as a court of equity, to compel the specific execution of said trust, by ordering and directing that every building or other erection made on the said dedicated property, contrary to the intent and meaning of said dedication, be removed therefrom, to have all parties restrained and perpetually enjoined from making any new erections on said dedicated property, or using the same for any purpose or purposes than those contemplated by the said proprietors, in said act of dedication, and to have the right of visitation adjudged and secured to your orators, their heirs and assigns, forever."

The bill then avers that the people of Hamilton, and all claiming under them, have, by the misuser aforesaid, forfeited all right to said premises, and that complainants are entitled to a decree against them for two undivided thirds thereof, and to a decree against the heirs of Symmes for the legal title to said two-thirds: and that, as to the remaining third, the heirs of Ludlow have a right to the like relief.

The heirs of Ludlow, the heirs of Symmes, the city of Cincinnati, the commissioners of Hamilton county, the Cincinnati College, the Young Men's Mercantile Library Association, the First 489] Presbyterian Society in Cincinnati, and divers *individuals

claiming title to, or in occupation of, portions of said property, are made defendants.

The prayer of the bill is :

1. "That the defendants, Anna Harrison et al., the only heirs of the said John Cleves Symmes, deceased, convey to your orators, their heirs and assigns forever, the legal title to two undivided third parts of the said dedicated property."

2. "That the residue of the defendants convey to your orators, their heirs and assigns forever, two undivided third parts of all the interest, title and estate acquired by them, or either of them, directly or indirectly, under, and in virtue of the dedication aforesaid, and respectively surrender up to your orators, the possession of the said two undivided third parts of the said dedicated property, on your orators paying two-thirds of the balance which may be found due to any one or more of them, for valuable and lasting improvements made by him, her or them, and taxes paid on said property, after deducting therefrom the annual value of the rents and profits thereof, and the interest."

3. "In case one or more of said defendants are entitled to protection, on the ground of being an innocent purchaser, or any other cause, then and in that case your orators pray your honor to adjudge, order and decree that the value or values of said dedicated property be ascertained, and the aggregate value of two-thirds thereof be paid by the said county of Hamilton to your orators."

4. "If, upon an investigation of this cause, your honor should be of opinion that the title which became vested in the said county of Hamilton, in virtue of the dedication by the proprietors of the said town of Cincinnati, as aforesaid, has not, in virtue of the premises, become forfeited, then that your honor adjudge, order and decree that all the private and public buildings and other erections now standing on the said dedicated property, or any part or parts thereof, except a court-house, a jail, a church and school, be removed from off the same; that said defendants be perpetually enjoined from erecting any new buildings thereon, except a court-house, a jail, a church and school, and appropriating said property to any other use or purpose than those above indicated. And that the right of visitation of the two undivided third parts of the said dedicated property be, by your decree, secured to your orators, their heirs and assigns forever."

5. And for general relief.

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The cause came on to be heard upon demurrers of the Presbyterian Society and others to the bill, and was argued by *V. Worthington*, and *Pugh*, *Attorney General*, for the demurrants, and *Thomas Scott* and *James H. Thompson*, for the complainants.

The demurrants made the following points :

1. The bill shows, in the complainants, no interest in, or control over the subject-matter of the suit.

2. The deeds from Symmes, of 1797 and 1798, to the trustees of the church and county, respectively, concluded the ancestor of the complainants; and therefore, they have no right to the relief sought by their bill.

3. The complainants' claim asserted by their bill is stale and lost by the lapse of time and the statute of limitations.

4. The bill is multifarious.

For the complainants, it was contended :

1. That there was no dedication prior to the recording of the town plat in 1802. That Williams then owned, by virtue of his deeds from Freeman and Denman, two undivided thirds of the property, and Ludlow owned the other third.

2. That, by the dedication, an easement only was conveyed to Hamilton county, the equitable fee being left in Williams and Ludlow.

3. That the right to said easement had become forfeited by the misuser aforesaid, and that, consequently, the complainants have a right to two-thirds of the property divested of the easement, and Ludlow's heirs have a right to the other third.

491] *4. That if no forfeiture has occurred the complainants have a right of visitation.

5. Or, at all events, a right to enforce the specific execution of the purposes of the dedication.

6. That the complainants are not barred by lapse of time, for the following reasons:

1. It does not appear by the bill that the misuser of the property, claimed by the Presbyterian Society, commenced in the lifetime of Joel Williams.

2. If it does so appear, yet the infancy of Ludlow's heirs is a sufficient excuse for Williams' failure to prosecute; and the complainants were for a long time uninformed of their rights.

3. There is no bar to a recovery on the ground of forfeiture, unless twenty-one years have elapsed since the forfeiture.

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4. On the termination, in 1842, of the life-estate vested in Miller et als., in virtue of the conveyance to them by Symmes, as aforesaid, the legal estate or title became vested in Symmes' heirs, as trustees for those who were in equity entitled to the property. Where a trust is broken, and then something done which is a full bar to the *cestui que trust*, yet the lands coming afterward to the trustee's hands, he will be decreed to convey to the *cestui que trust*.

5. The misuser was a fraud, and therefore lapse of time is no defense.

6. The case presented is a pure technical trust, against which time will not begin to run until after the trustee has legally and honestly divested himself of the trust.

7. Time never runs against the state. The state, by the territorial law aforesaid, became a party to the contract between the county and the proprietors of Cincinnati. It guaranteed the faithful execution of the trust by the county.

8. The defense of the statute of limitations, or lapse of time, must be set up by plea or answer.

THURMAN, J. The complainants contend that the conveyances from Freeman and Denman to their ancestor, Joel Williams, *invested him with a perfectly equitable title to two undivided third parts of the premises in controversy: that Israel Ludlow was seized of a like title to the remaining third; that John C. Symmes held the naked legal title, in trust for their use and for no other purpose; and that no dedication of the premises was made prior to the recording of the town plat in 1802. If this is so, it follows that the conveyances made by Symmes, in 1797 and 1798, to the trustees of the church and the county respectively, were, unless authorized by Williams, plain violations, by Symmes, of his duty as trustee; and the titles asserted under these conveyances were and are adversary to the title of the complainants. [492]

Now, considering that when these conveyances were executed Williams was a resident of Cincinnati; that they were recorded soon after their execution; that he must be presumed to have had notice of them; that he lived until October 29, 1824, a period of over twenty-six years, without ever attempting to impeach them or to disturb the possession taken under them; that a further period of twenty-four years, making over fifty years in all, elapsed before this suit was brought; that, in all that time, no claim to the prem-

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ises appears to have been made by Williams or Ludlow, or the heirs of either, and that the property was, during this period, largely built upon and improved by Symmes' grantees or those claiming under them; we would have no difficulty in presuming that the grants were made by the direction or with the consent of Williams, were it not that certain allegations of the bill seem to imply that he did not so acquiesce. It is averred that he "was prevented from interposing a check to the first erection of buildings, on the dedicated property, not contemplated by the proprietors in making the dedication, in consequence of the minority of Ludlow's heirs, the youngest of whom (Israel Ludlow) did not attain majority until May, 1825," several months after Williams' decease. It is by no means clear that this averment is sufficient to prevent the presumption of acquiescence. Probably it is not. But let it be deemed sufficient, and it results that *the possession under Symmes' deeds was an adverse possession, and that the claim of complainants is barred by lapse of time, unless the bill shows some reason that negatives such a bar. The reasons assigned by counsel are:

First. That it does not appear by the bill that the misuser of the property claimed by the Presbyterian Society commenced in the lifetime of Williams.

But the quotation above made from the bill shows that the alleged misuser of some part, if not the whole of the eight lots, did commence in his lifetime; for it is averred that he was prevented from checking it by the infancy of Ludlow's heirs. Now, if this user was not of the lots, or some parts thereof, claimed by the Presbyterian Society, then there is nothing in the bill to rebut the presumption that Williams acquiesced in, or even directed the conveyance to the trustees of the Society. The allegation above quoted is the only one that tends to show his dissent; and if that does not apply to the lots of the church, then no dissent is directly or indirectly averred, and there is nothing to prevent a presumption of consent or acquiescence. It may be said that the recording of the town plat in 1802 is evidence of dissent, since the eight lots are thereon designated as reserved for a court-house, a jail, a church, and a school. But the proving and recording this plat was not an original act of dedication. Williams and Ludlow made no dedication by it. On the contrary, the bill expressly avers, and to the same effect is Williams' oath to the plat, that it was made out in

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strict accordance with the original plat made by the first proprietors of the town, and which had been lost or destroyed. The reservation or dedication took place, therefore, when the town was laid out in 1789. The second section of the territorial law, cited in the bill, under which the plat of 1802 was made and recorded, or rather attempted so to be, had reference solely to towns already laid out, and to the recording of plats of such existing towns. It had no relation to towns, or parts of towns, to be subsequently laid out, or dedications to be subsequently made. They are provided for in other parts of the act. And this is an answer, if one were [494] needed, to the argument of complainants' counsel, that the proprietors in 1789 had no sufficient title to the land on which the town was laid out to enable them to make a valid dedication. Other satisfactory evidence might be given; but it is enough to say that, if they made no dedication, none was made at all. For Williams did nothing more than prove and record, or rather attempt to prove and record a copy of the original plat. We call what he did an attempt, because he states in his affidavit that his plat is made out agreeably to the original plat, plan, design, and intentions of Denman, Patterson, and Filson, who, he says, were the original proprietors of the town. Now, the bill shows that the town was not laid out until after Filson's death, and that the proprietors were Denman, Patterson, and Ludlow. But, whoever were the original proprietors, it is obvious that proving and recording in 1802 what had been done in 1789 is no evidence that Williams did not acquiesce in the conveyances made by Symmes in 1797 and 1798. Whether he consented or not to those conveyances, it is evidently proper to prove and record a copy of the original plat, and just as proper in the one case as in the other.

Again: If the allegation in the bill, in reference to the buildings erected in Williams' lifetime, is so ambiguous as to leave it altogether uncertain whether they stood on the lots claimed by the church, or on those claimed by the county, or some on one and some on the other, the rule, that where a pleading admits of either of several constructions equally well, that construction is to be adopted which is least favorable to the pleader, will authorize defendants to insist, if it is to their advantage to do so, that the buildings were some upon the county lots and others upon the church lots and that thus the alleged misuser was of the whole property, and commenced in the lifetime of Williams.

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Another answer yet remains. If it is true, as contended by complainant's counsel, that there was no dedication by the original proprietors, then, as we have shown, there was no dedication at all. 495] And if it is also true, as contended by *the same counsel, that, when Symmes made his said conveyances, Williams was seized of a perfect equitable title to two-thirds of the granted premises, it follows that it is wholly immaterial what the use was that commenced in his lifetime; for, in the case supposed, *any use* of the premises by the defendants, was a violation of his right. Now, it is nowhere denied in the bill that the grantees of Symmes took immediate possession. It is not necessary to affirm the proposition asserted by the defendants' counsel, that the law presumes, in the absence of averment or proof, that actual possession accompanies the legal title. Possibly, this may be so; but we are not obliged to decide the question. For we think it fairly inferable, from the allegations of the bill, that immediate possession was so taken, and that it has been held ever since by the grantees of Symmes and those claiming under them.

The second reason assigned why lapse of time is no bar, is that some of Ludlow's heirs were infants during Williams' lifetime; and that, for a long time after his death, the complainants were uninformed of their rights.

It is impossible to see how Williams' delay could be excused by the infancy of Ludlow's heirs. If he had any interest in or control over the property, it was competent for him to assert his right without their being joined as plaintiffs in the suit. They are not plaintiffs in the present bill, and for the same reason that the complainants may proceed without them, their ancestor might have so proceeded.

As to the ignorance of the complainants, it can not avail them. Time had began to run against their claim in the lifetime of their ancestor, who was under no disability and was cognizant of his rights. Indeed, whatever equity he may have once possessed, had become stale before his death. He suffered over twenty-six years to elapse, after the execution of Symmes' deeds, without asserting any claim against them, or to the possession held under them. In all that time, he took no step to acquire the legal title, or the possession, or to prohibit the uses to which the property was applied, or in any manner to supervise or control it.

496] *The third reason assigned is that there is no bar to a re-

covery on the ground of forfeiture, unless twenty-one years have elapsed since the forfeiture.

This reason rests upon the assumption that the property was dedicated in 1802, and has been forfeited by misuser. But we are now considering the case as if no dedication was ever made, a view we are compelled to take, by the argument, that the property was not dedicated by the original proprietors. If it was not dedicated by them, it was not dedicated at all, as we have before stated.

But let it be granted that it was dedicated in 1802, as complainants contend, and let it also be admitted, as they assert, that a misuser worked a forfeiture; how, then, stands the case? The misuser, and consequently the forfeiture, took place in the lifetime of Williams. Time, then, began to run against him, and over twenty-four years expired before this suit was brought. So that, upon the compliants' own propositions, they are barred. But what ground is there for saying there has been a forfeiture? Plainly none at all. The uses declared by the alleged dedication, adverse rights aside, are neither obsolete nor impossible of execution. They are perpetual uses, and the right is vested in a perpetual corporation or corporations. Neither the county nor the city are temporary creations. They yet exist, and must continue to exist. They must have a court-house and jail, not only now, but forever, and the people must always have churches and schools. The law on this point is well stated in "*Barclay v. Howell's Lessee*," 6 Pet. 507. The court said:

"If this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery, to compel a specific execution of the trust, by restraining the corporation or by causing the removal of obstructions. But, even in such a case, the property dedicated would not revert to the original owner. The use would still remain in the public, limited only by the conditions imposed in the grant."

*To the same effect is *Webb v. Moler*, 8 Ohio, 552.

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The fourth reason given is, that the deeds of Symmes conveyed but life estates, which have terminated by the deaths of the last survivors, and the legal title is now in Symmes' heirs, as trustees; and it is said that where a trust is broken, and then something is done which is a full bar to the *cestui que trust*, yet the lands coming

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afterwards to the trustee's hands, he will be decreed to convey to the *cestui que trust*.

As to the deed to McClure and McCullough, trustees of the county, if it were admitted that it conveyed but a life estate, the admission would not avail the complainants. For McClure, the survivor, died in 1820, in the lifetime of Williams, and twenty-eight years elapsed thereafter before this suit was brought.

But is it true these deeds conveyed nothing but estates for life?

In *Oates v. Cooke*, 3 Burr. 1684, it was held that a devise containing no words of perpetuity passed a fee, because it was upon trusts that required a fee to support them.

In *Newhall v. Wheeler*, 7 Mass. 188, the case depended upon the construction of a deed made by Joshua Simonds to Samuel Cummings and others, selectmen of Hollis, and their successors in office, for the use, benefit and behoof of Josiah Hunt, and after his decease, if any of the premises should remain, then to Hunt's heirs forever, to hold for the use aforesaid, at the discretion of the grantees, with a warranty against all persons claiming under Simonds, the grantor. The selectmen were not an incorporated body. The court, after distinguishing between a use and a trust—(a distinction that is immaterial in the present case, as the statute of uses has never been in force in Ohio, 7 Ohio, pt. 1, 275,) held that the deed passed a fee to the grantees. Parsons, Ch. J., delivering the opinion of the court, said: "We are of opinion that the selectmen, who were the immediate grantees, took the legal estate in trust for Josiah Hunt and his heirs." . . . "As the estate of 498] the grantees was in trust, it must be *commensurate to the trust, and therefore was an estate in fee simple."

In *Stearns v. Palmer*, 10 Metc. 32, which was an action of trespass, the deed was to Moses Bliss and others, "in trust to and for the use of the inhabitants of the first parish in Springfield for a burying ground forever." "To have and to hold the said land and premises to them, the said Moses, Zenas and Ariel, in trust to and for the use of the inhabitants of said first parish and their heirs forever, for a burying yard," with a covenant that the grantor would warrant the premises unto the grantees, "in trust as aforesaid, to and for the use of the inhabitants of said first parish and their heirs forever as a burying yard, as aforesaid." The grantees were not a corporation, and there were no words of perpetuity in the granting part of the deed. The court said: "Another objection to the plain-

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tiff's title is, that the trustees took only a life estate by the conveyance. But this grant was in trust 'for the use of the inhabitants of the first parish in Springfield, and their heirs forever for a burying yard.' And it is a well settled principle, that as the immediate grantees took the legal estate in trust, it must be commensurate to the trust. 7 Mass. 188. No form of words is required to create a trust. A trustee, or *cestui que trust*, will take a fee without the word "heirs," when a less estate will not be sufficient to satisfy the purposes of the trust. *Oates v. Cooke*, 3 Burr. 1684. *Fisher v. Fields*, 10 Johns. 505. *Welch v. Allen*, 21 Wend. 147. But the words 'their heirs,' in the deed in question, may be construed as applying to the immediate grantees, and ought to be so construed, if necessary to effectuate the clear intention of the parties. And there can be no doubt that the intention was to convey an estate in fee simple."

Gould v. Lamb, 11 Metc. 84, is to the same effect. The court said: "The objection to the title is, that this conveyance did not create a fee simple estate in Mark Healey, it not being a conveyance to him and his heirs; the words 'heirs' being absolutely necessary to create a fee simple; *and this is the general rule undoubt- [499] edly. But to this, as to all general rules, there are exceptions." The court then specify divers exceptions, among which is the case of a trust requiring a fee to feed it, in reference to which they say, that "it is a well settled rule of construction, that where the legal estate is conveyed in trust, it must be commensurate with the trust," citing *Newhall v. Wheeler*, and *Stearns v. Palmer*.

The same principle was fully recognized by the court of errors of New York, in *Fisher v. Fields*, 10 Johns. 505. Kent, delivering the unanimous opinion of the court, said: "A trustee or *cestui que trust* will take a fee, without the word heirs, when a less estate will not be sufficient to satisfy the purposes of the trust. This has been frequently ruled in chancery, and the court of King's bench, during the time of Lord Mansfield, made the same decision at law." In support of this statement, he cites numerous cases, to which it is unnecessary to refer, and then adds: "But what puts this point beyond all doubt is the doctrine of the common law on the subject of uses and trusts. Before the statute of uses, if a man had bargained and sold his land for a valuable consideration, without inserting the word *heirs*, the court of chancery would have decreed an execution of the use *in fee*, because the use was merely in trust and

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confidence, and because this was according to the conscience and intent of the parties. But after the statute of 27 Hen. VIII, as the uses were transferred and made a legal estate, a different rule took place (1 Co. 87, b. 100 b). A trust is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in chancery now, which were formerly applied to uses. And in exercising its jurisdiction over executory trusts, the court of chancery is not bound by the technical rules of law, but takes a wider range in favor of the intent of the party. This principle seems to be well established, and it has been ably vindicated by Fonblanque."

The same doctrine was held by the supreme court of New York, in *Welch v. Allen*, in ejectment, 21 Wend. 147.

500] *In the light of these decisions, the soundness of which there is not much room to doubt, let us examine the deeds in question. The first deed is to Moses Miller and others, trustees for the Presbyterian congregation of Cincinnati, "and their successors *forever*," "for the use, benefit, and behoof of the aforesaid congregation *forever*," with a covenant that Symmes and his heirs will warrant and *forever* defend the premises unto the grantees and their successors. Now, certainly, no language could more clearly declare a perpetual use or trust. The property is for the use of the congregation "*forever*," and the covenant of warranty is unlimited. The intention of the parties is placed beyond a doubt. A fee simple was plainly meant to be conveyed, and the deed must have that effect, if we follow the cases above cited, unless some fact exists that renders them inapplicable.

The complainants' counsel contend that such a fact does exist, namely, that the congregation was unincorporated at the date of the grant, and that therefore the trust was void for uncertainty as to the beneficiaries. In support of this proposition we are referred to the case of "*The Baptist Association v. Hart's Executors*," 4 Wheat. 1, in which it was held that the association, being an unincorporated body, did not take by a devise to it in trust for the education of youths for the ministry; in other words, that, not being a body corporate, it could not, as a society, hold property as a trustee; and that the legacy could not be sustained as a charity. But this decision is greatly shaken, if not wholly overruled, by the subsequent cases of *Bratly and Ritchie v. Kurtz*, 2 Pet. 584; *Inglis v. The Sailors' Snug Harbor*, 3 Pet. 99; and *Vidal v. Girard's execu-*

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tors, 2 How. 127. In the latter case, Judge Story, delivering the opinion of the court, very fully reviewed it, and showed that it rested upon two grounds that distinguished it from the case then under consideration, and which distinguished it also from the case before us. "There are," said the judge, "two circumstances which materially distinguish that case from the one now before the court. The first is, that that case arose under the law of *Virginia, [501 in which state the statute of 43 Eliz. ch. 4, had been expressly and entirely abolished by the legislature, so that no aid whatsoever could be derived from its provisions to sustain the bequest. The second is, that the donees (the trustees) were an unincorporated association, which had no legal capacity to take and hold the donation in succession for the purposes of the trust; and the beneficiaries were also uncertain and indefinite. Both circumstances, therefore, concurred; a donation to trustees incapable of taking, and beneficiaries uncertain and indefinite." And even these grounds, the judge proceeds to demonstrate, form, to say the least, a very doubtful support to the decision.

But in Ohio legislation has constantly tended to the same end as the statute of Elizabeth; and in the case before us, there is not that concurrence of circumstances—a grantee incapable of taking, and beneficiaries uncertain and indefinite—upon which so much stress was laid in the *Baptist Association v. Hart*.

It is unnecessary, however, for us to go beyond the decisions of our own courts, which, we think, are quite conclusive upon this question. In the very well considered case of the *Trustees of the McIntire Poor School v. The Zanesville Canal and Manufacturing Co.*, 9 Ohio, 287, the court said: "But one of the earliest demands of every social community upon its lawgivers, at the dawn of its civilization, is adequate protection to its property, and institutions which subserve public uses, or are devoted to its elevation, or consecrated to its religious culture, and its sepulchres; and in a proper case the courts of our state might be driven into the recognition of some principle analogous to that contained in the statute of Elizabeth, as a necessary element of our jurisprudence. 2 Story's Eq. 389; 17 Serg. & R. 88; 9 Cow. 437. But, without reference to these considerations, where a trust is plainly defined, and a trustee exists, capable of holding the property, and executing the trust, it has never been doubted that chancery has jurisdiction over it, by its own inherent authority, not derived from the statute, nor result-

502] ing *from its functions as *parens patriæ*. The property devised in this case consisted of land, personalty, and stock in the Zanesville Manufacturing Company; the legal ownership of this was either in McIntire's executor or heir. The condition on which the device ever took effect was the death of the daughter without issue. The objects of the testator's bounty were the poor children of Zanesville, and the benefit intended was their education. There is no doubt that a trust attached to the property, whoever might hold it; for whenever a person by will gives property, and points out the object, the property, and the way it should go, a trust is created. And a bequest of land to A, to construct an asylum for aged sailors, although inefficacious to pass the legal title, sufficiently defines the trust, and charges the heirs with its performance. 3 Pet. 119, 152; 1 Story's Eq. 415; 4 Wheat. appendix. The position, therefore, taken by the heirs in the plea, that the land descended to them, on the death of the daughter, absolved from the trust, is not supported, but overruled.

This decision was fully approved by this court, at the present term in the case of *Urmey's ex'rs v. Wooden*, in which a devise in these words: "The remainder of my estate I do hereby give and devise to the poor and needy, fatherless, etc.," of two townships named, "to such poor as are not able to support themselves, to be divided as my executors may deem proper without any partiality," was held to be valid and effectual for the purposes therein expressed.

We are therefore clear that the trust in question is not void for uncertainty as to the beneficiaries. The trustees were capable of taking, and it is admitted, they took a life estate at least, and the beneficiaries were easily to be ascertained. And when the latter were afterwards incorporated, the corporation became the beneficiary. And whether the legal title has gone to the heirs of the trustees, or to the heirs of Symmes, it remains subject to the trust. In the language of the court, in the case above cited from 9 Ohio, the "trust attached to the property, whoever might hold it." That is 503] *to say, whoever derives title under Symmes is affected by the trust.

With these authorities before us, we would have no difficulty in holding that a legal estate in fee passed by Symmes' deeds, were it not for the case of *Miles v. Fisher*, 10 Ohio, 1, in which it was held that a devise to trustees who were unincorporated, and their successors, in trust for certain perpetual uses, invested them with a

life estate only. But it is to be observed that the question whether they took a fee, does not seem to have been argued, and the case, as to the point now under consideration, is possibly of doubtful authority. But, be this as it may, it can not avail the complainants. For, the court, in express words, declared "that the charity might subsist and cling to the land, whether the legal title be held by the trustee or the heir."

The same result will be arrived at by following the cases of *Territt v. Taylor*, 9 Cranch, 43, and *Mason v. Muncaster*, 9 Wheat. 445, in which it was held that, "although the church wardens of a parish (the wardens being an unincorporated body), are not capable of holding lands, and a deed to them and their successors in office, forever, can not operate by way of grant; yet, where it contains a covenant of general warranty, binding the grantors and their heirs forever, it may operate by way of estoppel, to confirm to the church and its privies the perpetual and beneficial estate in the land."

The trust created by the deed to the trustees of the county, is not declared, in express words, to be forever; but a fair construction of the whole instrument irresistibly leads to the conclusion that a perpetual trust was intended, and that the conveyance was designed to pass a fee. The receipt of the consideration money is admitted, and the grantees, McClure and McCullough, and their executors, successors, and assigns, are acquitted and discharged thereof; the property is granted to McClure and McCullough, "in trust for the uses and purposes thereof intended by the people of the said county of Hamilton," with all the privileges and appurtenances "for public purposes, and for the use of the people of the *county of [504 Hamilton;" to have and to hold, etc., "as trustees for said county of Hamilton for all public purposes," and the covenant of warranty is with McClure and McCullough, and their heirs and successors in trust," to warrant and forever defend the premises against all lawful claims whatsoever. Now, it would not, perhaps, be going beyond what the court, in *Stearns v. Palmer*, above cited, thought might be done, to hold that the word "heirs," in this covenant of warranty has the effect to extend the granting clause in the deed to the heirs of McClure and McCullough. But we are not called upon to so rule, for we are satisfied that the principles we have applied to the other deed will, when applied to this one, produce a

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like result. Besides, as we have already said, the county is plainly protected by lapse of time.

But were it admitted that these deeds are ineffectual to pass a legal estate in fee, there is yet another difficulty in the way of the complainants. That they were designed to convey a fee can not, with any reason, be denied; and such being the fact, a court of equity will not lend itself to defeat the intent. In a proper proceeding they might be reformed, if necessary, and if that would be done, the complainants can not found an equity upon their defects. *Piatt v. St. Clair*, 7 Ohio, pt. 2, 169.

It is said, however, that the grantees or those claiming under them have no equity, because it is averred in the bill and admitted by the demurrers, that the considerations expressed in the deeds have never been paid. We do not agree that it is so admitted. The allegations in the bill are simply that the complainants have heard and so charge that there has been no payment. But "it has been determined, upon demurrer, that it is not a sufficient averment of a fact in a bill to state the plaintiff is so informed." *Mitford's Pl.* 40, note 9; 1 Ves. 56. Be this, however, as it may, we think it will be time enough to inquire about this non-payment when the heirs of Symmes complain of it. And should they so complain, 505] they would perhaps find that, as their ancestor acknowledged the payment by his deeds, and as he, or they, without asserting any claim, have stood by for over fifty years and seen the property occupied and improved by the grantees and those holding under them, it is now too late to question the fact of payment.

Entertaining these opinions, we see no benefit that could result to the complainants from a decree against Symmes' heirs for the legal title, supposing it to be in them. If it is in them, they are estopped by the covenants of their ancestor from asserting it against the trusts created by his deeds; and whoever claims under them must be in like manner estopped.

But it may be said that, if the defendants have only an equity, then there is equity against equity, and the complainants' equity being prior in time is stronger in right. To this it is a sufficient answer that the complainants' equity, if it ever existed, is stale, while the defendants' is in full force and vigor.

The next reason given why lapse of time is no defense, is that the alleged misuser was a fraud.

It is undoubtedly true that there are cases of fraud that render

this defense unavailable; as where a person has been misled by the misrepresentations of another, or kept in ignorance of his rights by one who ought to have disclosed them. But there is nothing of this kind in the case before us. The general allegation of combination and confederacy, which is relied on by counsel, is not such an averment as to defeat the bar. That allegation had its origin in the idea that, without such a statement, new parties could not be added to the bill; but as the idea is erroneous, the allegation is unnecessary. Mitford, 33; Lube, 204. Where the injury complained of is the result of actual combination and fraud, they must be averred, not, in a mere general manner, but with the same precision that is required in other averments of fact.

The sixth reason is that, "the case here presented is a pure technical trust, against which time will not begin to run so as eventually to operate as a bar, until after the trustee has legally and honestly divested himself of the trust."

*This reason is founded upon the assumption, that the probate and recording of the plat in 1802 was a dedication, which, by force of the territorial law, invested the county with the equitable title of the premises, in trust for the purposes of the dedication. "The trust in this case," say counsel, "was cast upon the county by law—it can not divest itself of the trust by either neglecting or refusing to do its duty by a faithful execution of the trust, or by transferring the trust property to others."

As before stated, we are now considering the case irrespective of any supposed dedication. We shall presently state our opinion whether there was a dedication, and when it was made, and examine the case under that aspect. But we may, without difficulty, digress so far as to consider the point just stated. We have already said that, in our judgment, there was no dedication in 1802. There was no attempt to dedicate then. All that Williams undertook to do was to prove and record what, he said, in substance, was a copy of the original plat of 1789. For the reasons already given, we think his acts were wholly nugatory. And we are of the same opinion for another reason. It appears from the bill that Ludlow was one of the original proprietors, and it is nowhere shown, either in the bill or in the probate of the plat of 1802, that he was not a resident of the territory, or that he was absent from it when that plat was proved and recorded. But unless he was dead (the bill shows that he was not) or had removed from the territory (which

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does not appear) Williams had no right to make and record a plat. It was only when the original proprietors were dead, or had removed from the territory, that a third person was authorized by the law to act.

Again, it does not appear by the bill that the defendants, or either of them, have ever claimed or held the premises under the supposed dedication of 1802. On the contrary, the bill shows the derivation of their claims in the conveyances of Symmes. Now, although it is true, as a general rule, that, as between trustee and 507] *cestui que trust*, lapse of time is no bar, yet it is equally true that where the former, with the knowledge of the latter, disclaims the trust, either expressly or by acts that necessarily imply a disclaimer, and an unbroken possession follows in the trustee or those claiming under him, for a period equal to that prescribed in the act of limitations to constitute a bar, such lapse of time, under such circumstances, may be relied upon as a defense. Speaking of the relations of landlord and tenant, mortgagor and mortgagee, trustee and *cestui que trust*, the supreme court of the United States, in *Willison v. Watkins*, 3 Pet. 48, said: "The same principle (that governing landlord and tenant) applies to mortgagor and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another, by a recognition of his title. On all these subjects, the law is too well settled to require illustration or reasoning, or to admit of a doubt. But we do not think that, in any of these relations, it has been adopted to the extent contended for in this case, which presents a disclaimer by a tenant, with the knowledge of his landlord, and an unbroken possession afterward for such a length of time that the act of limitations has run out four times before he has done any act to assert his right to the land. Few stronger cases than this can occur; and if the plaintiff can recover, without any other evidence of title than a tendency existing thirty years before suit brought, it must be conceded that no length of time, no disclaimer of tenancy by the tenant, and no implied acquiescence of the landlord, can protect a possession acquired under such a tenure."

Apply these remarks to the present case. Symmes conveyed the property either with or without the consent of Williams. If with his consent, the complainants have clearly no estate. If without it, what higher act of disclaimer of Williams' rights could have been performed? Yet, with full knowledge of the facts, Williams

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and his heirs quietly suffered an adverse possession to remain in the grantees and those claiming under them for more than fifty years. We say with full knowledge, because Williams was a resident of *Cincinnati, the deeds were recorded, and knowledge of them is not denied. It would be difficult to find a stronger case for setting up the defense of lapse of time. [508]

The next proposition of counsel is that, by force of the territorial law, the state is a guarantor of the faithful execution of the trust by the county, and that time never runs against the state.

We do not perceive that the state has any rights, or is under any liabilities, in the premises. If she has any rights, they will be considered when she asserts them. The complainants have no authority to assert them for her.

Lastly, it is urged that the defense of lapse of time must be set up by plea or answer.

It is clear, however, upon both authority and reason, that it is available upon demurrer. *Harpending v. The Dutch Church*, 16 Pet. 486; *Humbert v. Trinity Church*, 24 Wend. 587; *Foster v. Hodgson*, 19 Ves. Jr. 180, 186, note 1; 2 Ves. Jr. 83, note 2 (Sumner's ed.); *Story's Eq. Pl. sections 484, 503, and note 4; Hovenden v. Armesley*, 2 Sch. & Lefr. 636.

It remains for us to consider whether, upon the facts stated in the bill, there has ever been a dedication, for any purpose, of the property in controversy; and, if so, when it was made, and what, if any, is its effect in this suit. We have already so far anticipated these questions that but little need be added upon them. Taking the allegations of fact in the bill to be true—as we must, upon demurrer—it seems clear to us that there was a dedication by the original proprietors, in 1789, for the purposes of a court-house, a jail, a church, and a school. It is expressly averred that when the town was laid out, and the streets, alleys, and lots marked, in that year, a map thereof was made by the proprietors, on which they noted these eight lots as reserved for the purposes aforesaid. There is nothing in the bill that shows that this was a mere private note or memorandum, but, on the contrary, various facts that are alleged, in addition to those above stated, make it evident that it was designed as a dedication. This dedication *might well [509] be valid, although the proprietors were not seized of a legal estate, and there was no grantee, *in esse*, to take a fee. This was expressly decided in *Cincinnati v. White*, 6 Pet. 431, where the question was

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as to the "common," on this same plat. And *Brown v. Manning*, 6 Ohio, 303, is to the same effect.

The dedication having been made then, in 1789, it is contended, by defendants' counsel, that the subsequent conveyances, under which Joel Williams claimed, transferred no estate to him in these eight lots; that they had become the property of the public, or, at least, that it could not have been the intention of the grantors to convey property that had been dedicated to public use. But we are not prepared so to decide. In *Cincinnati v. White*, the court seems to have regarded the dedication of the "common" as a grant of an easement only. Possibly the same view should be taken of the dedication under consideration. If so, the equitable fee, subject to the easement, remained in the proprietors and was transferable. And the conveyances under which Williams claimed were comprehensive enough to include it. When the dedication took place and these conveyances were made, there was no statute vesting in a town or county the fee in property dedicated to public uses. The territorial law was passed afterward; and the recording of the plat of 1802 was a nugatory act; the bill shows no record, sufficient under that law, to vest the fee in the county. And we are not prepared to say that it is matter of history, of which we can officially take notice, that a plat was properly recorded pursuant to the law; though what was said in *Cincinnati v. Hamilton Co.*, 7 Ohio, pt. 1, 88, might seem to warrant our doing so.

But it is not necessary for us to decide these questions. Let it be assumed that an easement only was granted by the dedication, and that, subject thereto, Williams became seized of the equitable fee, what right have the complainants to the relief they seek. They are not entitled to the property itself, divested of the ease-
510] ment, for there has been *no forfeiture. Misuser or nonuser does not, in a case like this, work a forfeiture, as we have already shown. Then, as to their claim to have the purpose of the dedication specifically executed, it is to be remarked, in the first place, that they ask no execution of any uses declared in 1789. They rely on the supposed dedication of 1802, and pray that its uses may be enforced. But there was no dedication in 1802. So, the ground of their prayer utterly fails.

Secondly: The right to a public easement may be lost by an adverse possession, just as a private right may be. We do not, of course, speak of easements belonging to the state. But, as against

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counties, cities, and towns, the statute of limitations runs as it does against individuals. So it was held in *Cincinnati v. The First Presbyterian Church*, 8 Ohio, 298. That was an action of ejectment, brought to recover the four lots now in controversy, possessed by the church. The city claimed under and in virtue of the dedication made by the proprietors of the town. The defendant set up the statute of limitations in bar. And the defense prevailed.

Now, it can not be maintained that the uses declared in Symmes' deeds are the same as those expressed in the dedication. They are evidently much larger uses, and may be very different. The grantees of Symmes have, accordingly, held and improved the property, in derogation of, and adverse to, the dedication. They have covered it with a multitude of buildings not contemplated by the dedicators. And having thus adversely held it for over fifty years, and thus adversely used it for at least a quarter of a century, it is too late now to recur to the purposes of the dedication. They are gone by lapse of time, and the uses declared in Symmes' deeds have taken their place.

The views we have taken of the case make it unnecessary to consider the claims of complainants to a visitatorial power. We may remark, however, that neither they nor their ancestor have ever possessed such a power. The most he or they could do was to invoke the aid of the chancellor to enforce the uses of the [511] dedication; and if that right ever existed it has been lost by delay in asserting it. The demurrers must be sustained.

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A fixture is an article which was a chattel, but which, by being affixed to the realty, became accessory to it and parcel of it.

The true criterion of a fixture is the united application of the following requisites, to-wit: 1. Actual annexation to the realty, or something appurtenant thereto. 2. Application to the use, or purpose to which that part of the realty with which it is connected is appropriated. 3. The intention of the party making the annexation to make a permanent accession to the freehold.

The criterion of a fixture applicable to machinery in a mill or manufactory is

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not different from that which applies to articles affixed to the freehold in any other situation.

A mill or manufactory, including all its essential parts, may unite in the same business, and for producing a common result, portions of real estate, with articles of personal property, retaining all the essential qualities of chattels.

The machinery in a woollen factory, consisting of carding machines, spinning machines, power looms, etc., connected with the motive power of the steam engine by bands and straps, but in no wise attached to the building in which used, except by cleats, or other means to confine them to their proper places for use, and subject to removal whenever convenience or business may require without injury, are not fixtures, but chattel property.

The legal qualities of articles attached to the realty may be determined or ascertained from the agreement and understanding of parties; and a sale and conveyance of a mill, or manufacturing establishment, as such, by any general name or terms of description commonly understood to embrace all its essential parts, passes the machinery belonging to such mill or establishment, whether affixed to the freehold or not; but otherwise, if the language is merely descriptive of the realty with its appurtenances.

A decree in chancery, which leaves the equity of the case, or some material question connected with the merits of the controversy, for future determination, is an interlocutory and not a final decree.

An appeal from a final decree opens up the whole merits of the cause for investigation, which were involved in, or connected with the subject-matter of such decree.

Where an injunction to stay the sale of any particular property by virtue of certain levies have been dissolved as to a part of the property only, and continued as to the balance, and the property released not diminished in 512] *value in consequence of the injunction, has been sold and the proceeds of the sale applied on the judgments under which the levies had been made, no decree against the complainant should be rendered, on account of the dissolution of the injunction, for the amount of the judgment, penalty, etc.

RESERVED by the late supreme court on the circuit in the county of Jefferson, at the October term, A. D. 1851.

This is a suit in chancery, instituted by James Teaff, in the court of common pleas of Jefferson county, against Samuel Hewitt, and sundry others as creditors of said Hewitt, for the appraisalment and sale of certain mortgaged premises to satisfy a claim of complainant against Hewitt, and also to enjoin sundry judgment creditors of Hewitt from detaching certain alleged parts of the mortgaged premises, and selling the same on execution as chattel property. The bill was filed and injunction allowed, October 1st, A. D. 1849.

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It appears in the case, that in May, 1848, Teaff executed four several notes with Hewitt, and as security for Hewitt, two of which were payable, each in the sum of \$1,000, to Daniel Ammon, one in twelve, and the other in twenty-four months from date; and the other two of which were payable to Joseph S. Thomas, one for \$175, in eight months from date, and the other for \$45.89, in six months from date; all of which notes, at the time of filing the bill, remained unpaid, and the complainant liable for the payment of the same. And a few days after the execution of said notes, in order to secure Teaff for his liabilities on the same, a mortgage was duly executed and recorded by Hewitt to Teaff. The mortgage describes the mortgaged premises as "lot No. 322, in Veirs' Addition to the town of Steubenville, on which is erected a woollen manufactory," and conveys the lot with the appurtenances, etc. The condition was, that if Hewitt paid the notes when they became due, and kept Teaff from any loss, costs or damages, by reason of the same, then the mortgage to be void; otherwise in full force.

At the time the bill was filed, a judgment on the notes payable to Thomas against the makers, for \$238.19, was existing, *on [513 which execution had been issued; and a suit was pending on one of the notes payable to Ammon.

At the May term, A. D. 1849, of the court of common pleas of said county, Teaff recovered a judgment against Hewitt, in said court, for \$442.30 damages and costs of suit, which the bill alleged remained unsatisfied, and the first lien on Hewitt's property, subject to the lien of the mortgage aforesaid, as to the property covered by it. But Hewitt, in his answer, states that he was informed and believed, that, after the filing of the bill, said judgment had been discharged and satisfied by the sale of other property not described in the mortgage.

The bill represents that the defendants, Alexander Meikle, A. H. Dohrman & Co., and G. E. Warner & Co., Thomas M'Coy, Goudy & Co., and Gregg & Co., each claiming to have recovered judgments against Hewitt, have sued out executions and placed them in the hands of the sheriff, and that the sheriff, by virtue of these executions, and one on the judgment in favor of Thomas aforesaid, had levied on the steam engine, the boilers and fixtures belonging thereto, four sets woollen carding machines, consisting of eight breakers and four finishers, one wool-picker, four spinning-jacks, two yarn reels, three bobbin machines, one beaming machine,

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twenty-one power looms, and one rolling machine, and all the fixtures by which the same are connected together, and connected to the earth and to the buildings, the whole situated on lot No. 322.

That John Andrews, Wm. Kilgore & Co., Daniel Ammon, Thos. Johnston, Thomas L. Fleming, Wm. Elliott & Co., James Sinclair, and Wm. McLaughlin, claiming to have judgments before justices of the peace against said Hewitt, have taken out executions thereon and levied them upon the same property, and threaten to tear it down, and sell it in satisfaction of their executions.

Also, that if said property is torn down and removed and sold, said lot, as it will then be left, will not be of sufficient value to indemnify complainant for his responsibilities, and he will be subject 514] to great loss and damage thereby. That *Hewitt has failed and is in insolvent circumstances, and has no other property out of which complainant can reasonably hope to be indemnified, etc.

At the November term, the appearance term, Meikle, Warner & Co., and Dohrman & Co. filed a joint answer, in which they set up their several judgments, and admit the issuing of executions and levies as charged in the bill. They admit the mortgage, but deny that any title or interest in the machinery levied on, was acquired by it; say that Teaff, on the same day that the mortgage was executed, took a chattel mortgage on a part of the property levied on, and deposited it in the recorder's office of Jefferson county, but that said chattel mortgage expired before their levy, and was not renewed.

They filed with the answer a motion to dissolve the injunction, which was granted, except as to the steam engine and boilers.

The dissolution of the injunction extended to the machinery, consisting of the carding machines, spinning machines, power looms, and other appendages thereof, which were connected with the motive power of the steam engine by bands and straps; but the injunction was continued as to the steam engine and boilers.

Substantially to the same effect of the joint answer aforesaid, are the answers of the defendants, Goudy & Co., M'Coy, Gregg & Co., Stanton, Sinclair, Andrews, McLaughlin, Elliott & Co., and Henning; being judgment creditors of Hewitt, Thomas Ammon, Kilgore & Son, and Johnson never answered the bill. The respondent, Hewitt, answering, admits the execution of the notes and mortgage as aforesaid; admits his failing circumstances and the recovery of the judgments against him, and issue of execution thereon; and,

in further answering, he says that the boilers referred to in said bill are suspended by bolts upon timbers planted in the earth, and can be detached upon removing the bolts, without disturbing the timbers, and that they can be raised or lowered by turning the nuts upon the bolts, and there is built under *them a brick [515 furnace, but that they are not supported by, and do not rest upon any brick work. That the steam engine is fastened upon timbers, which are laid upon a stone wall, but said timbers are not in any way fastened to the said walls; that the other machinery in said building is generally fastened to the floor for the purpose of keeping it steady; but that any of them may be detached without injury to the machine itself, or to the building; and this respondent has been accustomed, since he has used and occupied said building for the purpose of manufacturing, to remove said machinery from one part of the building to the other to suit his convenience, to sell it, to purchase other machinery to supply his wants and place it in the building. This respondent, in further answering, says, that from the best estimate he has been able to make of the value of said property, it was, in his opinion, worth, at the time of the allowance of said writ of injunction, more than six thousand three hundred dollars, of which estimate, the boilers and engine are estimated at eight hundred dollars, and the other machinery in the building at five thousand five hundred dollars, and perhaps more; that the said Teaff claimed, at the time of respondent's answering, to be in possession of the whole of said property, and has caused the same to be advertised for sale. In further answering, he says that at the time of the execution of the mortgage on said lot, it was understood between the parties to be a conveyance, subject to the condition therein mentioned, of the said lot and the building erected thereon, and that at the time when the above-mentioned mortgage was executed, respondent executed a mortgage of the same date, upon the machinery in said bill named, in which the same was treated by the parties and understood to be personal chattels; that said mortgage was in pursuance of the statute in such case made and provided, deposited with the recorder of Jefferson county, said chattels then being in the town of Steubenville; that in all the dealings between respondent and the said Teaff, in reference to said machinery, it was treated and regarded as personal property, and the *said [516 respondent here refers to a copy of said chattel mortgage, on file

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amongst the papers of this case, and makes the same a part of his answer.

A replication was put in to all the answers. And, at the May term, 1850, the dissolution of the injunction was extended to all the respondents who had answered the bill in accordance with the former order of dissolution. In the mean time writs of *venditioni exponas* were sued out as follows: by Meikle, Warner & Co., and Dohrman & Co., on the 10th day of December, 1849, and by Goudy & Co., Gregg & Co., and McCoy, on the 28th December, 1849.

At the last mentioned term of the common pleas, the court ascertained the amount due Teaff, as security, as aforesaid, to be \$2,357.14, and decreed the sale of the lot, including the engine and boilers, on the mortgage, and referred the cause to a master commissioner under special instructions.

The order for the sale of the mortgaged premises was issued, and the lot, including the engine and boilers, sold for \$711, of which \$107.90 was absorbed by costs of suit, all of which were ordered to be paid out of that fund, leaving \$603.10 to be applied on the debt of complainant.

At the August term, 1850, the master's report was made. He reported the value of the property as to which the injunction had been dissolved at \$5,868.12. That had it been sold without injunction, it would have sold for \$2,034.66. That the sheriff had sold all the property as to which the injunction had been dissolved, before the May term, 1850, for \$2,034.66. That the judgments enjoined amounted, with interest and costs to August 27, 1850, to \$3,377.56. That property not covered by the injunction had been sold by the same executions to the amount of \$18.65. Total amount of sales, \$2,053.31. That the three judgments of Meikle, Warner, and Dohrman, amounting to \$1,652.48, had been paid off out of the proceeds, leaving \$400.83 unapplied. That the three judgments of Meikle, Warner, and Dohrman were transferred to James Teaff on the 31st of December, 1849.

517] *The court thereupon decreed that Teaff pay the amounts of all the several judgments enjoined and remaining unsatisfied, with five per cent. penalty, amounting to \$1,808.26, and the costs, within thirty days.

Teaff, complainant, appealed.

Roswell Marsh, for complainant.

The appropriate remedy for a mortgagee against a mortgagor in

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possession, who is impairing the security by committing waste, is a bill in chancery for an injunction. *Cooper v. Davis*, 16 Conn. 556; *Brady v. Waldron*, 2 Johns. 148; *Salmon v. Clagett*, 3 Bland. 125; *Capner v. Flemington Mining Co.*, 2 Green, 467; *Loudon v. Warfield*, 5 J. J. Marsh, 196; *Allen v. McCune*, 15 Ohio, 726.

If the injunction was well allowed as to any part of the property, and a part of the judgment creditors proceeded to sell such property after the injunction was dissolved in the court below, a decree should be rendered against such judgment creditors, and also against those who sued out writs of *venditioni exponas*, and proceeded to sell before the injunction was dissolved as to them, and before they had answered the bill for the balance due Teaff on his mortgage, and for all costs, it appearing by the sale of the property that it was sufficient for that purpose, Hewitt being insolvent.

If the injunction was properly dissolved, the judgment creditors had four alternatives: 1st. To decline to answer the bill, in which case they can not have any decree. 2nd. To proceed to levy upon the other property of the debtor and seek to satisfy their judgments in that way, which must be taken as an abandonment of the former levy. 3rd. After the dissolution of the injunction, to proceed to sell the property levied on by execution; and 4th. To abandon the property levied on and rely upon the injunction bond.

Stanton & McCook, for the judgment creditors of Hewitt: *Hillyer v. Richards*, 13 Ohio, 135; *Portsmouth & Columbus Turnpike Co. v. Byington*, 12 Ohio, 114; *Lewis v. Sutliff*, 8 Ohio, 60.

**R. S. Moody*, for respondents: 1. The machinery in the [518] bill described is chattel property and not realty. *Elwes v. Moore*, 3 East. 38; *Trapp v. Harter*, 3 Tyrw. 604; *Cresson v. Stout*, 17 Johns. 116; *Swift v. Thompson*, 9 Conn. 63; *Sturges v. Warren*, 11 Vt. 433; *Gale v. Ward*, 14 Mass. 352; *Smith's Lead. Cas.* 169.

2. If the items of machinery named in the bill, or any of them, be fixtures, which under other circumstances would have passed by deed or mortgage, that the mortgagor and mortgagee have, by agreement, treated them as chattels, and that, as between the mortgagee and the creditors of the mortgagor, the mortgagee is estopped from denying that agreement. *Cully v. Tuppnell*, Buller's N. P. 34; *Davis v. Jones*, 2 B. & W. 165; *Wetherell v. Howells*, 1 Camp. 537; *Grady's Laws of Fixtures*, vol. 49, Law Lib.

Roswell Marsh, for complainants in reply.

There is no competent proof in the case of the existence of a

chattel mortgage. If there were any such proof, a mistake as to the nature of the property, or a step taken out of abundant caution, could not change the nature of the property or impair the complainant's security. The complainant's suffering the chattel mortgage to expire, if one existed, would show that better consideration had determined him to treat it in its true nature.

The articles in controversy were fixtures, and as such a part of the freehold.

The orders of November term, 1849, and of May term, 1850, were merely interlocutory, based upon the idea that the answers denying all equity in the bill authorized the dissolution of the injunction. The merits of the case were to come up afterward, when the court might find the answers false and reinstate the injunction and make it perpetual. It would have been idle, however, to have reinstated the injunction in this case, after the property in controversy had been forced to sale on execution. The merits on the main 519] *point in controversy were not finally disposed of till the decree at the August term, from which complainant might well appeal.

The decree at the August term was erroneous—1st. In finding the equity of the case with the respondents, instead of the complainants, as to the property relative to which the injunction had been dissolved; 2d. In finding that the respondents had not abandoned their levies on the property in controversy; and 3d. In rendering a decree against complainant for the amount of the claims of the judgment creditors, with the five per cent. penalty—when, in fact, the equity was with the complainant, and he entitled to a decree against the respondents, who had sold the property on execution, as to which the injunction was dissolved, for the balance due on his mortgage, with the costs of suit.

BARTLEY, C. J. The questions presented by this case for determination are as follows:

I. Does the appeal from the decree of the August term, 1850, open up the merits of the case touching the property as to which the injunction had been dissolved?

II. Was the property, relative to which the injunction was dissolved, parcel of the realty, or was it chattel property?

III. If the latter, and the property had not diminished in value in consequence of the injunction, but had been, after the dissolu-

tion of the injunction, sold on execution, and the proceeds applied on the judgments, were the defendants entitled to any decree against the complainant for the amount of their judgments and the penalty?

Of these in their order :

I. An appeal from a decree is nothing else than a proceeding in the original cause, which continues the case, by vacating or suspending the decree, till the final hearing in the appellate court. The 55th section of the law of March 10th, 1831, directing the mode of proceeding in chancery (29 Ohio L. 81), authorized an appeal to the supreme court, from any final sentence or decree in chancery, in the court of common *pleas, on the terms pre- [520] scribed. A final decree is one which determines and disposes of the whole merits of the cause before the court, or a branch of the cause, which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination; so that it will not be necessary to bring the cause, or that separate branch of the cause, again before the court for further decision. It is true that after final decree, defining and settling the rights of the parties, further orders or decrees may be necessary to carry into effect the rights settled by the final decree on the merits; such as a decree confirming a sale, or confirming the proceedings or report of a master carrying into effect the terms of the final decree. This, however, is a subsequent proceeding, and only auxiliary to, or in execution of, the final decree on the merits of the case. And an appeal from a decree, in this subsequent proceeding, brings nothing before the court except the proceedings which follow the final determination of the merits. *Hey v. Schooley et al.*, 7 Ohio, 49; 5 Cranch, 313; 10 Wheat. 442. An interlocutory decree is one which leaves the equity of the case, or some material question connected with it, for future determination. Where the further action of the court is necessary to give the complete relief contemplated by the court, upon the merits, the decree under which the further question arises is to be regarded, not as final, but as interlocutory. *Cocke v. Gilpin*, 1 Rob. Va. 20.

The case before us presents a double aspect for the subject-matter of a decree. The object of the bill was to sell the mortgaged premises, and apply the proceeds of the sale to the payment of Hewitt's indebtedness to complainant; and also to enjoin the proceedings under the judgments of the other creditors of Hewitt, and

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prevent the sale of the machinery in the manufactory, which the complainant claimed to be a part of the realty, and to be covered by his mortgage. After the dissolution of the injunction, the respondents, who were judgment creditors of Hewitt, sold the property as to which the injunction was dissolved, on execution. At 521] the *May term of the common pleas, 1850, Teaff, the complainant, took his decree, upon one branch of the case, against Hewitt, for the amount of his debt, with interest and cost of suit, and, in default of the payment of the same, for the appraisement and sale of the mortgaged premises, including the steam-engine and boilers, as to which the injunction had not been dissolved. The decree upon this branch of the case, at that term, was complete and final; no further action of the court was requisite. The defendants did not appeal from this decree, but acquiesced in it; and this part of the case is not now in controversy, as it appears, between the parties.

But, as to the other branch of the case, the court at that term extended the dissolution of the injunction to the defendants who had answered the bill, subsequent to the preceding term, and referred the cause to a master to take testimony and report under special instructions at the next term, touching the value of the machinery as to which the injunction was dissolved, at the time the injunction was granted; what it would have sold for on execution had no injunction been granted; whether the same had been sold by the sheriff on execution after the dissolution of the injunction; and if so, upon whose executions, to whom sold, and for what amount; the amount of the judgments enjoined, their priority as to liens, the amount yet due thereon, and the transfers of said judgments, if any, since their rendition, and to whom made, etc. The main question touching the rights of the parties involved in this branch of the case was left for the future action of the court on the coming in of the report of the master.

The decision that the steam-engine and boilers, as to which the injunction had not been dissolved, were fixtures and covered by the mortgage, and the order for their sale as a part of the mortgaged premises, did not determine the rights of the parties in the property as to which the injunction had been dissolved. That property had been detached and sold on execution prior to this decree, and was not, therefore, in a situation to be appraised and sold under 522] the *mortgage, if even it had belonged to the realty. And

whether the complainant was in equity entitled to a decree against the defendants who had caused the property to be sold on execution, or if properly so sold, what decree, if any, the defendants were entitled to against the complainant, was left for future determination. And at the August term, 1850, the court determined this branch of the case, by finding that the defendants had not abandoned their levies, and by rendering a decree against the complainant for the balance on the defendant's judgments with interest and the penalty of five per cent., besides the costs of the suit. From this decree the complainant might well appeal, and the appeal opens up the whole merits touching this branch of the case, at least between him and the judgment creditors.

II. Was the property in controversy covered by the mortgage on the realty, or was it chattel property? This is the main question in the case, and one of great importance.

The bill and answers, which are under oath, furnish the only testimony to be found in the case, as to the nature and description of the property, the mode of its annexation, and the purpose for which it was annexed to the realty, all of which appear in the statement of the case.

It appears that the boilers were bolted upon timbers which were planted in the earth, with a brick furnace built under them and adapted to their use, but they rested upon the timbers to which they were bolted, and by which they were supported rather than upon the brick work. The steam-engine was fastened upon timbers which rested for their foundation on a stone wall laid in the earth. The other machinery, consisting of carding machines, spinning machines, power looms, etc., was connected with the motive power of the steam-engine by means of bands and straps, and attached to the building only so far as to confine the different parts in their proper places for use. It appears from the answers, that such machinery as carding machines and spinning machines, and power looms, etc., is generally fastened to the floor by cleats *or other similar modes of attachment, for the purpose of [523 keeping the various parts steady and in a suitable position for use; but that they are easily detached, as were these, without injury to the machinery itself, or the building; and that such machinery is usually subject to be removed from one part of the building to another to suit convenience, and sometimes sold, and other machinery sup-

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plied to take its place, whenever the interest of the business for which it is used may require.

The doctrine of fixtures, by which the nature and legal incidents of this property must be determined, is involved in no inconsiderable degree of uncertainty, and not settled by consistent and clearly defined principles of general application. It rests upon a long course of judicial decisions, made at different periods of time and under a variety of circumstances, and running into numerous complex and conflicting distinctions arising out of the peculiar relation of the parties and the peculiar circumstances of each particular case; so that it has been found extremely difficult to reduce this branch of the law to any consistent and uniform system.

According to the decisions, an article may be a fixture constituting a part of the realty as between vendor and vendee, which would not, under like circumstances, be such, as between landlord and tenant; so also, an article may be such fixture as between heir and executor, which, under like circumstances of annexation, would not be such as between tenant for life and the remainderman or reversioner. And also, according to the decisions, an article affixed to the premises for purposes merely agricultural, may pass by a conveyance of the freehold as a fixture, which would not be such fixture under like annexation, if erected or affixed for the purposes of trade or manufacture; and an article attached to the realty may be removable at one period of time as a chattel, which, with the same annexation at another period, would not be removable, because it constituted a part of the realty. In some cases it has been determined that, in order to constitute a fixture, the article should 524] *be so united by physical annexation to the land or to some substance previously belonging thereto, that it can not be detached without injury to the property; while in other cases, articles have been determined to be fixtures, and as such to pass by a conveyance of the freehold, with but a slight attachment to the realty, and in some instances without any actual, but by simply a constructive attachment.

The term fixture itself, although always applied to articles of the nature of personal property which have been affixed to land, has been used with different significations, until it has become a term of ambiguous meaning. And this ambiguity which has attended the use of this word in various adjudications, and by different writers, has been productive of much of the uncertainty which has

perplexed investigations falling under this branch of the law. The term fixture has been used by various writers and in numerous reported decisions, as denoting personal chattels annexed to land which may be severed and removed against the will of the owner of the freehold by the party who has annexed them, or his personal representatives. Amos & Ferard on the Law of Fixtures, 2; Gibbon's Manual of the Law of Fixtures, 2; Grady's Law of Fixtures, 1; 2 Bouvier's Institutes of American Law, 162; 2 Kent Com. 344.

There may be some propriety in this definition of the term when confined in its application to the relation of landlord and tenant, or tenant for life or years and remainderman or reversioner, to which several of the elementary authors have chiefly confined their attention. But it does not appear to express the accurate meaning of the term in its general application. An article attached to the realty, but which is removable against the will of the owner of the land, has not lost the nature and incidents of chattel property. It is still movable property, passes to the executor and not to the heir on the death of the owner, and may be taken on execution and sold as other chattels, etc. A removable fixture as a term of general application is a solecism—a contradiction in words. There does not appear to be any necessity or *propriety in classifying [525] movable articles which may be for temporary purposes somewhat attached to the land, under any general denomination distinguishing them from other chattel property. A tree growing upon the soil, or any other article belonging to the freehold, may be converted into a chattel by a severance from the land.

It is an ancient maxim of the law that whatever becomes fixed to the realty, thereby becomes accessory to the freehold, and partakes of all its legal incidents and properties, and can not be severed and removed without the consent of the owner. *Quidquid plantatur solo, solo cedit*, is the language of antiquity in which the maxim has been expressed. The term fixture, in its ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and the legal incidents of the property; and it appears to be not only appropriate but necessary to distinguish this class of property from movable property, possessing the nature and incidents of chattels. It is in this sense that the term is used in far the greater part of the adjudicated cases. Co. Lit. 53, a. 4; 2 Smith's Leading Cases, 114; Chancellor Kent's

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note (a) 2 Kent's Com. 345; *Dudley v. Ward*, Ambl. 113; *Elwes v. Mawe*, 3 East, 57. It is said that this rule has been greatly relaxed by exceptions to it, established in favor of trade, and also in favor of the tenant as between landlord and tenant. And the attempt to establish the whole doctrine of fixtures upon these exceptions to the general rule, has occasioned much confusion and misunderstanding on this subject.

Amos & Ferard in their treatise on the law of fixtures, mention the division of the subject into removable and irremovable fixtures, and give a definition of each class. (See Amos & Ferard on Fixtures, 11.) And they remark, "that it is difficult to determine in which of the above senses it is most frequently employed." This classification of fixtures may be essential to a correct understanding of the double sense in which the term has been frequently used in the authorities; but it would not seem to be needed for any other purpose.

526] *The civil law has been commended for its simple and natural classification of property into the obvious and universal distinction of things movable and things immovable, things tangible and things intangible. Whatever would be movable property by the civil law, would fall under the denomination of chattels personal by the common law. And everything attached by the freehold, *perpetui usus causa*, belongs to the *res immobiles* of the civil law. Taylor's Elements of the Civil Law, 475. This simple division of property seems to be founded in reason and the nature of things.

The great difficulty which has always perplexed investigation upon this subject has been the want of some certain, settled, and unvarying standard, by which it could be determined what amounts to a fixture, or what connection with the land will deprive a chattel of its peculiar legal qualities as such, and make it accessory to the freehold. Fixtures belong to that class of property which stands upon the boundary line between the two grand divisions of things real and things personal into which the law has classified property; a distinction not merely artificial, but founded on reason and the nature of things—regarding not only the natural qualities of immobility on the one hand, and mobility on the other, but also the legal constitution and incidents to which each class respectively is subject. In the great order of nature, when we compare a thing at the extremity of one class with a thing at the extremity of another, the

difference is glaring; but when we approach the connecting link between the two great divisions, it is often difficult to discover the precise point where the dividing line is drawn.

There are some matters having their foundation in things real, which are, nevertheless, by the principles of the common law, attended with some of the qualities of things personal, and therefore termed chattels real. Such are estates less than freehold, easements, rents, emblements, etc. These, however, are easily identified, and have no connection with fixtures. And again there are others which, though *movable in their nature and apparently fall- [527] ing within the definition of things personal, are, in respect of their legal qualities, of the nature of things real. Belonging to this class are heir-looms and things in the nature of heir-looms, which, by special custom, pass with the inheritance; also animals, *feræ naturæ*, not domesticated, so as to fall under the denomination of chattels, yet so confined to the realty as to become appurtenant to it; such as deer in a park, pigeons in a pigeon-house, conies in a warren, fish in a pond, etc.; also articles sometimes called fixtures on the principle of constructive attachment; such as the deeds and other papers which constitute the muniments of title to the land, the keys of a house, etc., which belong to the realty and pass with it, not upon the principle of fixtures, but upon the principle of being necessary and essential incidents to it, and of no value abstracted from it. None of these articles acquire their legal qualities upon the principle of a fixture.

A fixture is an article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it. But the precise point in the connection with the realty, where the article loses the legal qualities of a chattel and acquires those of the realty, often presents a question of great nicety and sometimes difficult determination. And a review of the authorities, from the time of the year books down to the present period, does not furnish any one established and certain criterion of universal application, by which this line of demarcation can be clearly ascertained and pointed out. It may, however, be useful, in the determination of this case, to examine the authorities and endeavor to extract from them the most uniform, reasonable and consistent principle, as a standard by which a fixture can always be determined.

If there be any thing well settled in the doctrine of fixtures, it

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is this, that to constitute a fixture, it is an essential requisite that the article be actually affixed or annexed to the realty. The term itself imports this. *Walker v. Sherman*, 20 Wend. 636. But the 528] mode or degree of the annexation *which is essential, is a matter about which the authorities are greatly in conflict. *Amos & Ferard*, in their work above referred to, page 2, lay down the rule as follows: "*It is necessary, in order to constitute a fixture, that the article should be let into or united to the land, or to substances previously connected therewith.*" The Manual of Gibbon and the work of Grady on fixtures, are to the same effect, and numerous adjudicated cases are referred to by these elementary writers, establishing the same doctrine. A number of the authorities, both English and American, decide, that to give chattels the character of fixtures, and deprive them of that of personalty, they must be so firmly affixed to the real estate that they can not be removed without injury to the freehold, by the act of removal and apart from the abstraction of the thing removed. *Charrar v. Chauffeete*, 5 Denio, 337. This doctrine, however, does not furnish a criterion of uniform application, or one which will bear the test of examination. Mill-stones in a mill, and even the water-wheel, and a great variety of other articles well established by authority and universally admitted to be fixtures, may often be removed without any actual injury to the structure or building by the act of removal. Fences, which are undeniably fixtures, and so admitted by all the authorities referring to them, although actually annexed to, and in connection with the land, are yet not let into the ground or fastened to any thing which is imbedded into the earth. The doors, windows, window-shutters, etc., of a mansion house may be raised and removed without any actual or physical injury either to the building or the article removed; so, also, in a mill, with the mill-stones, hoppers and bolting apparatus, as usually fixed in a mill; yet it has never been questioned that these articles are fixtures.

There is another class of authorities in which it is laid down that the true test of a fixture is the adaptation of the article to the use or purpose to which the realty is appropriated, however slight its physical connection with it. *Farrar v. Stackpole*, 6 Greenl. 157; *Gray v. Holdship*, 17 Serg. & R. 413. And some cases have gone 529] so far as to *make this the only test, and even dispense with actual or physical annexation. *Voorhis v. Freeman*, 2 Watts & S. 114; *Pyle v. Pennock*, Id. 391.

This rule is in conflict with those authorities which make the mode of the physical annexation *the test*, and it will not bear examination as a criterion of general application. If adaptation and necessity for the use and enjoyment of the realty be the sole test of a fixture, then the implements and domestic animals necessary for the cultivation of a farm, and a great variety of other articles subject to the use of the land or its appurtenances, which never have been and never can be recognized as such, would be fixtures. It would utterly confound the rule by which the rights of the vendor and vendee, heir and executor, etc., have been heretofore governed.

In the case of the *Despatch Line v. Billamy*, 12 N. H. 205, the court expressed the opinion that *actual annexation to the freehold and adaptation to its purpose* must both unite in order to render personal property incident and appurtenant to real estate.

In some of the authorities, the *intention* of the party making the annexation, is laid down as the true test of a fixture. *Winslow v. The Merchants' Ins. Co.*, 4 Metc. 306.

Mr. Dane, in his *Abridgement of American Law*, vol. 3, p. 156, remarks: "It is very difficult to extract from all the cases as to fixtures in the books any one principle on which they have been decided, though being fixed or fastened to the soil, house or freehold, seems to have been the leading one in some cases, yet not the only one." And he adds, in reference to this matter: "Not the mere fixing or fastening is alone to be regarded; but the use, nature and intention."

From the examination which I have been enabled to give to this subject, and after a careful review of the authorities, I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture:

*1. Actual annexation to the realty, or something appurtenant thereto. [530

2. Appropriation to the use or purpose of that part of the realty with which it is connected.

3. The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the *party* making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

This criterion furnishes a test of general and uniform application;

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one by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject. It may be found inconsistent with the reasoning and distinctions in many of the cases; but it is believed to be at variance with the conclusion in but few of the well-considered adjudications.

Adopting this as the criterion, there will be found no occasion for giving an ambiguous meaning to the term fixture; no occasion for denominating an article a fixture at one period of time, which with the same annexation would not be such at another period; no occasion for determining that to be a fixture as between vendor and vendee which under like circumstances would not be such as between landlord and tenant; or finding that to be a fixture as between heir and executor which under like circumstances of annexation would not be such as between tenant for life and remainderman or reversioner. *Sturges v. Warren*, 11 Vt. 433. It is true the time of the annexation and the relation and situation of the parties may constitute very important considerations in ascertaining the intention and object of making the annexation. Why is a tenant for life, or for years, or at will, favored with the right of removing articles which he attaches to the land during his term? The supreme court of Massachusetts say, in *Whiting v. Broston*, 4 Pick. 531] 311: "There seems to be no doubt that, according to *the later decisions in England and several cases in our own books, a tenant for life, for years, or at will, may, at the expiration of his estate, remove from the freehold all such improvements as were erected or placed there by him, the removal of which will not injure the premises or put them in a worse plight than they were in when he took possession." All that is required of a tenant is to leave the land in as good condition as it was when he received it. When, therefore, a tenant erects expensive structures for carrying on his trade or business, which can be removed without their destruction or material injury to the freehold, the presumption is a rational one, that it was not the *intention* of the tenant to make them permanent accessions to the freehold, and thereby donations to the owner of it. The *intention* of the tenant, clearly inferable from his situation and relation to the landlord, is the real foundation of the right of removal with which he has been favored. It is true, other reasons of great subtlety and considerations of public policy have been frequently assigned for this right of removal, but

they are doubtless attributable in some degree to a laudable desire on the part of the courts to carry out the real intention of the party.

It is said that the right of removal must be exercised by the tenant before the expiration of his term, or, in some cases, within a reasonable time afterwards; that the tenant can remove things which he has attached to the land for the purposes of trade or manufacture where not contrary to some prevailing custom, or where it can be done without material and essential injury to the freehold, or where the erections in themselves were strictly chattels in their nature before they were put up, and can be removed without being entirely demolished or losing their essential character or value. (Amos & Ferard on Fixtures, 40, 44.) And these circumstances furnish considerations bearing upon the intention of the tenant in making the erections, and their temporary nature and want of adaptation to the permanent use and enjoyment of the freehold, and show the application of the criterion here adopted.

*The rule requiring actual or physical annexation to the [532] realty is not affected by the few articles sometimes said to belong to the realty upon the principle of constructive annexation, but which, as has already been observed, are not in fact fixtures, but mere incidents to the freehold, and pass with it upon a different principle from that of a fixture; but the extent and mode of the annexation must depend much upon the nature of the article itself, the use to which it is applied, and other attending circumstances.

The rule requiring adaptation to the use or purpose of the realty was recognized in some of the earliest authorities. In the case of *Lawton v. Salmon*, 1 H. Black. 259, Lord Mansfield, on a question between heir and executor, respecting salt pans attached to the land and connected with salt works at a salt spring, declared the articles fixtures upon the principle that they were accessories to the freehold and necessary to its use and enjoyment. And it has been adjudged in numerous cases, that where an article attached to the realty is accessory to a matter of a personal nature, it should be considered itself as personalty and removable as such. *Lawton v. Lawton*, 3 Atk. 14; *Dudley v. Ward*, Amb. 113. Where articles were attached to the land for the purposes of trade or manufacture, which purposes were considered matters of a personal nature, the articles have been declared not to be fixtures. In the case of *Elwes v. Mawe*, 3 East. 54, Lord Ellenborough reviewed the cases from

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the time of the year books, and came to the conclusion that there was a well-founded distinction between articles annexed to the freehold for the purposes of trade or manufacture and those made for the purposes of agriculture—the right of removal existing to a much greater extent in case of the former than in that of the latter. This distinction, however, has been strongly questioned by high authority in this country. *Van Ness v. Pacard*, 2 Peters' U. S. 137; *Whiting v. Braston*, 4 Pick. 310. It was upon this doctrine, which was recognized by Lord Ellenborough, that the rule was laid down, 533] that articles annexed to the realty, for a *mixed purpose of the freehold and of personalty, were removable, and not fixtures. Hence it is said that Lord C. B. Comyns, as between heir and executor, decided that a cider mill firmly fixed in the ground was accessory to a species of trade, and, therefore, not a fixture. This distinction, however, as to articles annexed to the realty for a mixed purpose, does not appear to have been consistently recognized in this country.

Numerous exceptions to the rule that whatever is attached to the realty becomes a part of it, have been adopted in favor not only of trade and manufacturing, but also in favor of matters of ornamental and domestic use. Some of these exceptions have been based upon public policy, some upon the nature of the article itself, and some upon the ground of the articles being accessory to matters of a personal nature and not strictly subservient to the use and purposes of the freehold.

But if the third requisite of a fixture here adopted had been applied in the numerous cases of exceptions in favor of tenants, also in favor of trade and manufacture, and in favor of matters of ornament and domestic convenience, which fill so much space in the books, there would have been but little difficulty in determining that they were not fixtures. In all these cases denominated exceptions, the article could invariably have been removed without essential injury to the freehold or the article itself. In no case is a fixture created without the apparent intention of the party making the annexation to make a permanent accession to the freehold. And whether articles are personal property or fixtures must be determinable and plainly appear from an inspection of the property itself, taking into consideration its nature, mode of attachment, purpose for which used, and the relation of the party making the annexation, and in some instances, perhaps, other attending circum-

stances, indicating the intention to make it a temporary attachment or a permanent accession to the realty. And, inasmuch as it requires a positive act on the part of the person making the annexation to change the *nature and legal qualities of a chattel [534 into those of a fixture, the intention to make the article a permanent accession to the realty must affirmatively and plainly appear; and if it be a matter left in doubt or uncertainty, the legal qualities of the article are not changed, and the article must be deemed a chattel. In some instances, the intention to make the article a fixture may clearly appear from the mode of the attachment alone, as where a removal can not be made without serious injury to the property by the act of severance. But where the attachment is but slight, and does not enter into the physical structure of the realty, this intention must be gathered from the nature of the article and the other attending circumstances.

The criterion of a fixture above mentioned must, however, be subject to qualification in some respects. Whatever would otherwise be the rights of the parties connected with an article which has been attached to the realty, they are liable to be controlled by an established custom or the special agreement of the parties. The parties are presumed to be cognizant of an existing usage or custom, and to act with a tacit reference to it. And an article attached to the land may be a fixture or a chattel, according to the special agreement of the parties. *Naylor v. Collings*, 1 Taunt. 19; *Perry v. Brown*, 2 Stark, 403; *Earl of Mansfield v. Blackburn*, 6 Bing. (N. C.) 426.

By an application of the criterion here adopted to the case before the court, there is no difficulty in determining the character of the property in controversy. There was here actual connection with the realty, but it was slight. The bands and straps by which the machinery was attached to the motive power of the steam engine and boilers could easily be thrown off, and the cleats or means used to keep the machinery steady and in its proper place for use were such as to admit of its removal without injury to any property, or even inconvenience. The use or purpose to which the machinery was applied was that of a trade or the *business of manufacturing, in favor of which the authorities have made numerous exceptions to the principle of fixtures.

It may be said that the building in which the machinery was placed was parcel of the freehold, erected and used for the purpose of manufacturing, and that the machinery was accessory to it, and

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therefore adapted to the use to which that part of the realty with which it was connected was appropriated. But in truth the building itself was rather the accessory than the principal. It was in fact accessory to the business or pursuit carried on by the machinery within it, and if not firmly affixed to or founded in the earth in such manner as to show it to be a permanent structure and intended for a permanent appropriation of that part of the land to which it was attached, it would be movable property itself. This is supported by high authority. See *Elwes v. Mawe*, 3 East. 38, and cases there referred to. The business of manufacturing, it has been said, is a pursuit personal in its character, and not strictly subservient to real estate, or essential to the enjoyment of the freehold or inheritance in land. Upon this ground arose the distinction for a time recognized by the courts between articles for agricultural purposes and those erected for the purpose of trade or manufacture.

I would not be understood as saying that the use to which the property in controversy in this case was applied was decisive of its legal character. A manufacturing establishment, including all its essential parts, may unite in the same pursuit and for producing the same result, portions of real estate with articles of personal property, retaining all the essential qualities of chattels. In the various and complex pursuits of man, real estate and chattels are very frequently united in their application to the same use without either being made accessory to the other, while both united are made subservient to one common use or purpose.

That this machinery was not intended as a permanent accession to the freehold, and immovable as such, is so clear as scarcely to call for remark. Neither the mode of the annexation nor the use to which it was applied, indicated any design to change the character of the property. The nature of the property itself, the customary removal of it from place to place, its liability to be taken away or disposed of, and other articles of the same kind supplied to take its place, show that it was not intended to be made a permanent accession to the freehold, and therefore was not covered by the mortgage of the complainant.

It has been said that the description in complainant's mortgage covered this property even if it were personalty. It is true, that where a manufactory or a mill is conveyed or delivered by any general name or description which embraces all its essential parts

as such manufactory or mill, the machinery and all the necessary parts of the establishment pass, whether affixed to the freehold or not. Thus things personal in their nature, but fitted and adapted to be used with real estate, and essential to its beneficial enjoyment in such use, may pass with the realty by a conveyance and delivery under such a description, which would not pass by an ordinary conveyance of the land with its appurtenances. But, in this case, the language in complainant's mortgage, "*on which is erected a woolen manufactory,*" added to the description of the mortgaged premises by the number of the lot, etc., is descriptive of the realty merely.

It is claimed on the part of the complainant that the common law rule as to fixtures has been somewhat changed by the progress of society, and the advancement in the application of machinery to the purposes of manufactures, so as to create a different criterion of a fixture in a manufactory or a mill, from that which applies to articles attached to the realty under other circumstances. And upon this ground it is claimed that all the essential parts of a mill or manufactory, whether actually attached to the realty or not, become fixtures, and as such pass by a conveyance of the freehold. This doctrine, which seems to have been recognized in several of the states, derives its origin chiefly from the cases of *Farrar v. Stackpole*, 6 Greenl. 154, and *Voorhis v. Freeman*, 2 Watts & S. 116. The former case does not sustain the position assumed. That was trover for a mill, *chain, dogs, and bars attached to a saw- [537 mill. The plaintiff claimed the property by virtue of a deed conveying a "*saw-mill with the privileges and appurtenances,*" upon the grounds: 1st, that the articles, whether chattels or fixtures, formed essential parts of the saw-mill, and passed by the sale and conveyance of it as such; and 2d, that they were parts of the saw-mill and went with it by general and uniform usage. The court below ruled against the plaintiff on the first ground, but left the case on the second ground to the jury, which found for the plaintiff. This judgment was sustained by the supreme court, yet expressing an opinion at variance with the court below as to the first ground. Although some of the reasoning in this case was intended to show that the articles in question were fixtures, yet all that was settled by the adjudication was that the articles, whether fixtures or chattels, passed as essential parts of the saw-mill and its appurtenances conveyed as such.

The case of Voorhis v. Freeman, although professedly based on the principle settled in the case in the State of Maine, goes still further, and determines that machinery which is a constituent part of a manufactory, to the purposes of which the building has been adapted, and without which it would cease to be such manufactory, is a part of the freehold, although not actually affixed to it or in physical connection with it. This case was trover for the conversion of one hundred and six soft and chilled rolls belonging to the machinery of an iron rolling mill in the city of Pittsburg. The plaintiff claimed under a sale on execution as chattel property, and the defendant under a previous sale under a *levari facias* on a mortgage in which the premises were described as "a lot of ground with one iron rolling mill establishment situate thereon, with the buildings, apparatus, steam-engine, boilers, bellows, etc., attached to the said establishment." And the questions simply were whether they did not pass by the descriptive terms of the mortgage. The court held that, if chattels, the articles would have passed by force 538] of the word "*apparatus*" in the description of the premises. But Chief Justice Gibson, reaching the conclusion that "no distinctive principle prevades the cases universally on the subject of fixtures," repudiates the criterion of physical attachment as limited in its range and productive of contradiction, adopts the doctrine of constructive attachment, and attempts to establish a new criterion on the ground of public policy, as applicable to the machinery and implements in a manufactory. The only authority referred to by the learned chief justice, which even tends to sustain him, is the case of Farrar v. Stackpole; and instead of explaining how this new class of fixtures is to become incorporated into the realty and acquire its nature and incidents, he endeavors to maintain his position upon the ground of public policy, holding that it would be "ruinous to the manufacturer in Pennsylvania, where a statute directs that real estate shall not be sold on execution before the rents, issues, and profits shall have been found insufficient to satisfy the debt in seven years," to allow "a suffering creditor" to seize on execution the loose machinery and implements in a mill, and thus interrupt a "thriving business." Such is the principle of public policy, by which loose and movable property is to be made parcel of the freehold and subjected to what remains of the more permanent and unbending rules of the feudal tenure. Courts have generally declared it to be the policy of the law to guard against

all obstacles in the way of creditors. And this is perhaps the first instance in which movable property was, by constructive annexation, adjudged parcel of the realty for the avowed reason that it ought to be placed beyond the convenient reach of the legal process of creditors. The reasoning of Chief Justice Gibson might be legitimate in legislation, but it is not appropriate in judicial proceedings.

To what consequences would such a criterion lead if fully carried out? A cabinet maker erects a building for a cabinet shop, and furnishes it with all the necessary machinery, implements, tools, etc., for an establishment for the manufacture of furniture, some of which may be attached to the *building. All the machinery, [539 tools, implements, etc., whether actually attached to the building or not, and essential and necessary for the business of the establishment to which the building is adapted, and without which it would not be a perfect and complete establishment of the kind, would be parcel of the freehold. The application of the same rule would convert the benches and essential implements of the shoemaker's shop, the vises, hammers, and machinery of the copper-smith and tinner, and of other mechanics and manufacturers into realty. And inasmuch as some carry on their business on a much larger scale than others, a question of no little difficulty would arise as to the quantity of the loose implements and machinery which should be deemed essential to make it a complete establishment, and what might be rejected as unessential, and therefore chattels.

It may be inconvenient to the mechanic or the manufacturer to have the movable implements and machinery in his shop taken away upon execution. The same inconvenience, however, may be experienced by the agriculturist who may be prevented from putting in his crops by a similar removal of his team or farming utensils.

Several decisions have been subsequently made in Pennsylvania, and also in some of the other states, recognizing the doctrine of the case of *Voorhis v. Freeman*, but the great weight of authority both in England and in the United States is against it.

We are told by Lord Hardwicke, in the case of *Lawton v. Lawton*, 3 Atk. 15, that since the time of Henry the Seventh, the courts have, from considerations of public policy, been relaxing the strict construction of the law relating to fixtures, and that many articles

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attached to the realty are now movable, which formerly were considered parcel of the freehold. The progress of society, and improvements in business and commerce, have constantly tended to unfetter property, and especially all movable property, from the rigid rules of the feudal tenure. And no sound considerations of public policy can justify any retrograde change in the legal qualities of any kind of movable property by constructive attachment. 540] *to the freehold, for the purpose of favoring any one particular pursuit or business.

Swift v. Thompson, 9 Conn. 63, is a leading case in Connecticut, in which it was decided that the machinery of a cotton factory consisting partly of implements in no way attached to the building, and partly of spinning frames standing upon the floor and kept in their places by cleats about their feet, nailed to the floor, and partly of other machinery fastened by wood-screws passing into the floor, all of which could be removed without injury to the building or machinery, was personal property.

The case of Gale v. Ward, 14 Mass. 352, is a leading case in Massachusetts, in which it was held that carding machines in a woolen factory, not nailed to the floor, nor in any manner attached to the building except by the leather band which passed over the wheel or pulley to give motion to the machines, which band could be slipped off by hand, and was taken off and the machines removed from time to time, when repaired, were personal property. Each one of these machines was so heavy as to require four men to move it on the floor, and too large to be taken out at the door, but so constructed as to be easily unscrewed and taken in pieces. In deciding this case, Parker, Ch. J., said: "They must be considered as personal property, because, although in some sense attached to the freehold, yet they could easily be disconnected, and were capable of being used in any other building erected for similar purposes. It is true that the relaxation of the ancient doctrine respecting fixtures has been in favor of tenants against landlords, but the principle is correct in every point of view."

It has been said that the authority of this case was somewhat shaken by the case of Winslow v. The Merchants' Ins. Co., 4 Metc. 306, in which a steam engine, boilers, etc., and other machinery adapted to be moved by them, and connected with them, were decided to be fixtures. But from the peculiar structure of this machinery, the mode of its annexation, as well as its adaptation to

the use of the building, the court determined that it was permanent in its character, and intended as an accession to the realty. And Shaw, Ch. *J., in giving the opinion of the court, expressly refers to this case of *Gale v. Ward* in terms of approval. [541]

In the case of *Cresson v. Stout*, 17 Johns. 116, Mr. Justice Platt expressed the opinion that frames in a factory for spinning flax and tow, though fastened by upright pieces extending to the upper floor and cleats nailed to the floor round the feet, would not be considered fixtures.

In *Sturgis v. Warren*, 11 Verm. 433, machinery in a woolen factory affixed to the building in the usual manner with nails, screws and cleats was determined to be personal property.

The same principle was settled in *Trapps v. Harter*, 3 Tyrwhitt, 604, and in *Duck v. Braddy*, McClelland, 217, 13, Price, 455.

Walker v. Sherman, 20 Wend. 636, is a leading case in New York, in which it was decided, after a very full review of the authorities, that the removable parts of the machinery of a woolen factory, consisting of two double carding machines, a picking machine, shearing machine, spinning machine, looms, etc., were personal property. In this case it was conceded that the other machinery of the factory, consisting of the water wheel, fulling mill, dye-kettle, press and tenterbars were fixtures or parcel of the realty.

The recent cases of *Vanderpoel v. Van Allen*, 10 Barb. S. C. 157, and *Buckley v. Buckley et al.*, 11 Barb. S. C. 43, decided in New York, are not understood as varying the doctrine laid down in the case of *Walker v. Sherman*, and *Cresson v. Stout*.

Substantially the same ground has been taken in the State of Indiana. In the case of *Taffe v. Warnick*, 3 Blackf. 111, it was held that a carding machine situated in a building erected for the purpose of carrying on the carding business, standing on the floor in its usual place of operation, but not fastened to the building, is personal property. And in *Sparks v. The State Bank*, 7 Blackf. 469, it was held that a steam engine and boiler placed on a stone foundation, with a brick chimney at one end of the boiler, situated in a tanyard to facilitate the business of tanning, and used [542] for several years, but not so fixed but that they could be removed without injury to the building with which they were connected by braces, were fixtures.

Fixtures in a manufacturing establishment must be governed by the same criterion which applies to fixtures in other situations.

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The machinery and implements in such an establishment, although useful and even essential for the business carried on, which are not permanently affixed to the ground or the structure of the building, and which can be easily removed without material injury to the building or the articles themselves, and their place supplied by other articles of a similar kind, are not fixtures but personal property. But that portion of the machinery in such an establishment which is firmly affixed to the earth or to the structure of the building, and which from its nature, mode of attachment, use, and the relative situation of the party placing it there, was plainly intended to be permanent, is parcel of the freehold.

The question as to the steam engine and boilers is not directly involved in this case, the court not being called upon by the defendants to interfere with the decree of the May term for the sale of the mortgaged premises, from which no appeal was taken. The application of the principle, however, adopted in this case, plainly shows these articles to have been fixtures, and therefore parcel of the mortgaged premises. They were bolted and permanently fixed upon timbers, and stone and brick foundations laid in the earth, which were erected for them. The building itself was permanent and designed and used for a manufactory, and these articles of a ponderous character adapted to the production of the motive power of the establishment, were firmly affixed to the structure of that portion of the freehold appropriated to the purposes of the business, and clearly intended to be permanent. This is sustained by the case of *Allison v. McCune*, 15 Ohio, 729, where the court determined that a steam engine set on timbers laid on raised walls on the top 543] of the ground, and the machinery of a grist and saw-mill *attached by coupling shafts, drivers and straps, shown to be placed there for permanent use, were adjudged to be parcel of the freehold. And to the same effect is the case of *Powell v. Monson and Brimfield Man. Co.*, 3 Mason, 347, in which Mr. Justice Story has elaborately examined the subject of fixtures.

If it were necessary for the purpose of sustaining the dissolution of the injunction by the common pleas, we should further hold, that the parties having treated the property in controversy as personalty by the execution of the chattel mortgage and other acts, showing that the articles were not intended to be made fixtures, the complainant could not now have a decree for them as having been parcel of the freehold.

III. The injunction having been properly dissolved as to a part of the property only, and that too which had not diminished in value in consequence of the injunction, and which was sold on execution afterwards, and the proceeds of the sale applied upon the judgments, no decree should have been rendered against the complainant for the amount of the judgments at law and the penalty.

The 4th section of the act of March 12, 1845, directing the mode of proceeding in chancery under limited injunctions, provides that, on the dissolution of any injunction allowed to enjoin a levy upon or to stay the sale of any particular property by virtue of a levy, "the court shall render a decree for the party enjoined to an amount not exceeding the value of the property levied upon, nor exceeding the amount of the judgment at law and interest thereon and the costs accruing in such injunction proceedings, together with five per centum penalty on such value or judgment and interest," etc.

Courts are not to be confined to the letter of the law in giving it a construction. The maxim *hæret in litera hæret in cortice* is not to be forgotten. A statute must be construed with reference to the subject-matter of it, and its real object and true intent. The provision of law referred to was intended to further the administration of justice and equity. The only penalty imposed is that of the five per centum. *The decree authorized for an amount *not [544 exceeding the value of the property nor exceeding the amount of the judgment, is not by way of penalty, but with a view to an equitable compensation for the loss which may be sustained by means of the injunction, and operates simply as accumulative security so far as it goes for the payment of the defendant's debts, which could be but once collected. To allow a defendant who had abandoned his levy and obtained satisfaction of his judgment by the sale of other property, or to allow a defendant who had, after the dissolution of the injunction, proceeded and obtained satisfaction, by the sale of the property enjoined, to come in afterwards and take a decree for the full value of the property levied on not exceeding the amount of the judgment, and interest thereon, etc., together with the penalty of five per centum, would be, to say the least of it, grossly inequitable.*

In this case, the injunction was dissolved only as to a part of the property, and continued as to the balance. And it appears that the property was not diminished in value by means of the injunction, and that the defendants proceeded after the dissolution of the in-

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junction on their judgments at law and sold the property on execution, and applied the proceeds on their judgments. Under these circumstances the defendants were not entitled to the decree against the complainants which was rendered in the court of common pleas, either for the penalty or the amount of their judgments. From this decree the complainant having properly appealed, it is ordered that the defendants, in whose favor the decree was taken in the common pleas, pay the costs accruing on the appeal, and that the cause be remanded.

**JOSIAH R. STURGES AND ALONZO W. ANDERSON v. NICHOLAS
LONGWORTH AND DANIEL H. HORNE.**

The statute authorizing non-resident defendants to be brought into court by publication in a newspaper, refers as well to lunatic defendants as to sane persons.

545] *Where a lunatic defendant is a non-resident of the state, and has been brought into court by publication, it is competent for the court to appoint a guardian *ad litem* to defend the suit, although such guardian *ad litem* may not have been appointed the general guardian or committee of the lunatic.

It is error for the court to decree against a lunatic without an answer from his guardian *ad litem*.

When a decree is taken, as on petition confessed, against a lunatic and his guardian *ad litem*, as in default for answer, plea, or demurrer, even if the court had heard evidence as to the complainant's claim, it would not have cured the error; such evidence would be heard out of time.

All the parties to an original decree should join in a bill of review to reverse it.

Where the interests of two defendants are joint and inseparable, and the rights of one are saved under the provision of the statute of limitations, on account of his disability, such saving inures to the benefit of the other defendant, although laboring under no disability.

THIS is a bill of review reserved in the district court in Hamilton county.

The case sufficiently appears in the opinion of the court.

Storer & Gwynne, for complainants in review.

Alonzo W. Anderson is a proper party with Josiah R. Sturges, and is saved by his disability. *Kennedy's Heirs v. Duncan*, Har-

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din, 365; Mathew's Heirs v. Mathews, 12 Ohio, 351; Mease v. Keefe, 10 Ohio, 362; Story's Eq. Pl. sec. 409; Montgomery v. Brown, 2 Gilman, 581; 3 Dana, 32; Id. 300.

In the outset, error was committed in this, that the lunatic defendant was only brought into court by publication in a newspaper printed in Hamilton county. 2 Schoales & Lefr. 303; Hunt v. Lee, 10 Vet. 297. If the lunatic, however, was brought into court by publication, the suit could not properly proceed against him without making his committee or guardian a party, and the court of common pleas exceeded its power in appointing a guardian *ad litem* for the lunatic.

Milford's Eq. Pl. 94; 1 Barb. Ch. Pr. 52; Ex parte Ridgway, 5 Russ. 152; Gilbee v. Gilbee, 1 Phillips, 121; 3 P. Wms. 111; 2 Dick. 460; Parsons' Eq. Ca. 59; 8 Barr, 59.

*It is erroneous to proceed to a decree without an answer [546 from the guardian *ad litem* of a lunatic. Coleman v. Comm'r's Lunatic Asylum, 9 B. Monroe, 239; South v. Carr, 7 Min. 419; Harrison v. Rowan, 4 Wash. Cir. C. 207. In the case of infants, it is necessary that the guardian *ad litem* should appear and accept the appointment, or be served with process, and *a fortiori* in the case of a lunatic. St. Clair's Heirs v. Smith, 3 Ohio, 355; Ewing's Lessee v. Higby, 7 Ohio, pt. 1, 198; 1 A. K. Mar. 471; 5 J. J. Mar. 48; 6 Dana, 108; 2 B. Mon. 456; 4 Bibb. 11.

The decree is erroneous, being *pro confesso* against a lunatic. Massie v. Donaldson, 8 Ohio, 377; Allison v. Taylor, 6 Dana, 87; Shirley v. Taylor, 5 B. Mon. 104; Knight v. Young, 2 Ves. & Bea. 184; Altham v. Smith, 2 Cary, 93; Ward v. Kelly, 1 Carter, 101; 3 Barb. Ch. 132; 13 Mass. 112.

V. Worthington argued orally for the defendants, and

T. Ewing, for complainants in reply.

CALDWELL, J. The bill of review was filed on the 10th of June, 1847. The proceeding sought to be reviewed, commenced March 5, 1837, was a bill in chancery filed by Longworth & Horne, for the purpose of foreclosing a mortgage given by Sturges & Anderson, to them, on a tract of land adjoining the city of Cincinnati. The mortgage was given to secure four promissory notes for \$1,788 each, dated 4th January, 1837, given by Sturges and Anderson, for the purchase-money of the mortgaged premises. The bill alleges that the first of these notes has become due and is unpaid, and prays

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for a decree of payment or sale of the mortgaged premises. On the day of the filing of the bill, subpena was issued for the defendants and returned the same day, "served on Anderson, not found as to Sturges & Palmer."

April 24th, 1839, publication of notice was issued. On the 22d June, 1839, an entry of publication is made, approved by the court, and the cause is continued to November term, 1839. November 2, 547] 1839, Andrews' answer is filed, which *admits the purchase, the giving of the notes and mortgage; but claims that complainants have received on the mortgage debt \$744.44, which ought to be credited thereon; states that he and Sturges have made a division of the property, for the purpose of sale, by running streets and alleys through it, and dividing it into lots; and asks that if a sale be ordered, it be directed to be made according to a plat of the subdivision, which he sets forth as a part of his answer. Anderson further states in his answer that Sturges is insane. November 14, 1839, a replication is filed to this answer of Anderson. On the 15th November, 1839, the following entry is made: "On motion, the court appoint A. N. Riddle, one of the masters of this court, guardian *ad litem* for Josiah R. Sturges, one of the defendants in the above cause, and a lunatic, as the court is advised; and the said Adam N. Riddle appears and accepts said appointment, and is ruled to answer in sixty days, and cause continued." The guardian *ad litem* never answered. On the 4th of February, 1840, the following entry is made on the docket: "Decree *nisi* filed, and bill taken as confessed."

On the 6th of June, 1840, the decree *nisi* is entered on the minutes, which, so far as the recitals are important in the present controversy, reads as follows: "And now here to wit, on the 6th day of June, in the term of June aforesaid, this cause came on to be heard this day upon bill, answer of Alonzo W. Anderson, replication thereto, exhibits and testimony; and thereupon the court do find that due notice of the pendency of said bill has been given to the said Sturges and Palmer, who are now residents of the State of Ohio, by publication, as proved at the June term of this court, and that the said Sturges and Palmer are in default for plea, answer, and demurrer to said bill; and that the guardian *ad litem* appointed for said Sturges, a reputed lunatic, is also in default for plea, answer and demurrer; and thereupon the court do order said bill, as to them, to be taken as confessed; and now here the court, pro-

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ceeding to consider the said bill and answer, with the exhibits and testimony, after counsel being heard, and having fully examined the same, do find," etc. etc.

*The court go on to find the making of the notes and mortgage, and the amount due, etc. The decree finds that the first three notes with the interest are due and unpaid, and that the interest on the fourth note is unpaid, and decrees for the amount of the three notes due, principal and interest, and the interest due on the fourth note, amounting in all to \$6,761.83, and directs that in default of payment of that sum with interest from February 3d, 1840, within thirty days, an order for sale of the mortgaged premises shall issue. July 25th, 1840, an order of sale was issued, and on the 6th of October, 1840, a sale of the premises was made to the complainants, Longworth and Horne, for \$3,992. The sheriff, in making the sale, was governed by the plat of Sturges and Anderson. On the 11th of November, 1840, the sale was confirmed, and the sheriff was ordered to make a deed to Longworth and Horne; the court ordered the plat vacated, and directed the sheriff to make a deed for the whole mortgaged premises, including, as well, the streets and alleys on which the lots bounded as the lots themselves. The evidence leaves no doubt that during the time these proceedings were being had Sturges was insane. His insanity commenced near the first of the year 1839, and continued until sometime in 1844, or perhaps 1845.

The following are the principal alleged errors assigned by complainants in review :

1. The lunatic defendant was only brought into court by publication in a newspaper printed in Hamilton county.
2. If, however, the lunatic was brought into court by publication, the suit could not properly proceed against him, without making his committee or guardian a party; and the court of common pleas exceeded its powers in appointing a guardian *ad litem* for the lunatic.
3. It was error to proceed to a decree without an answer from the guardian *ad litem* of the lunatic.
4. The decree is erroneous, being a decree *pro confesso* against a lunatic.
- *5. The decree is erroneous, because it embraces money [549 claimed to be due upon notes which fell due after the bills were filed.
6. The decree of sale was erroneous, even if treated as a decree

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rendered on hearing, being rendered in June, 1840, and the defendants being decreed to pay a certain sum with interest from February, 1840.

7. The decree of sale was erroneous, because it decreed payment of two notes as due and unpaid before the bill was filed; whereas the bill only alleged one to be due and unpaid.

8. The decree of confirmation was erroneous, because it set aside the plats under which the sale had been made, and ordered a deed to the purchasers for the whole property, including the spaces left for streets, for which the purchasers neither bid nor paid anything.

As to the first error assigned: Could the defendant, being a non-resident lunatic, be brought into court by publication in a newspaper, under the provisions of the 7th section of the act regulating the practice in chancery, Swan's Stat. 701. In the first place, we would remark that the language of the statute applies to all defendants, as well lunatics as persons of sound mind. The mode of bringing parties into court, both at law and in chancery, is the subject of statutory enactment, the legislature evidently intending to cover the whole ground. No exception is made in favor of lunatics. The 5th and 6th sections of the act provide for the service of subpoena on defendants generally. Where the defendants are non-residents of the state, the necessity of the case is provided for, by authorizing the complainant to bring them into court by the service of a subpoena, with a copy of the bill, or by making publication in some newspaper printed in the county where the proceedings are instituted, and of general circulation therein. The 57th section of the statute provides, that a party to a decree in chancery may file a bill of review in five years, with a proviso in favor of insane persons, and others laboring under disability, fixing the limitation at five years after disability removed. The legislature, 550] in the formation of this code of practice, having had, as we see, the subject of lunatics before them; having provided for them specially, so far as the decree is concerned, and having made no such proviso in reference to the bringing them into court, we do not think the courts would be warranted in inferring such proviso.

It is contended, however, on the part of complainants in review, that although a lunatic would come within the letter of the statute, yet that, being incapable of receiving notice, he could not come within its spirit, and could not have been within the contemplation of the legislature.

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In support of this proposition, we are referred to the case of *Carew v. Johnson*, 2 Sholes and Lefroy, 303, where it was held, under a statute very similar to ours, that the notice provided for could only be considered as applicable to such persons as were capable of receiving notice, and consequently could not apply to a lunatic.

The lunatic, though incapable of defending himself, is still civilly liable; and it is necessary that he should be brought into court, that jurisdiction over the person should be obtained, before the court can proceed to act. If he is within the jurisdiction of the court, he should be served with process, as other parties are required to be served. The provision for giving notice by publication in a newspaper is a very imperfect mode of bringing parties into court. It is frequently altogether improbable, and sometimes impossible that the party or any of his friends should receive the notice; and it is only resorted to from the necessity of the case, on account of the difficulty or impossibility of giving other or more certain notice.

So far as the lunatic is concerned, he is incapable of looking after his own interests, no matter how he may be brought into court. He can do nothing toward his defense, nor can he, by any act, conclude his rights; his defense must be intrusted to others. If served with process in the ordinary way, or if brought personally into court, his acts, or admissions, or denials, amount to nothing; he must appear and act by a representative. In contemplation of law, he is totally incapable of understanding or appreciating the notice or process, in whatever form it may be given.

The important difference between a lunatic and a sane person does not consist so much in the mode of the court obtaining jurisdiction over the person, as in the proceedings after that jurisdiction has been obtained. The legislature having liberally embraced all parties within the provisions of the act, unless it would be clearly in violation of its spirit to include insane defendants, we could not hold that they were without its provisions. We suppose, then, that insane persons come within the provision of the statute, and that, therefore, *Sturges* was properly brought into court. But *Sturges*, although brought into court, was insane, and this brings us to the clause of assigned errors relating to the proceedings in the progress of the cause.

It is said that it was error in the court to proceed against the lunatic, without making his committee or guardian a party, and that the court exceeded its authority in appointing a guardian *ad litem*.

In England, it appears to be the usual practice of the courts to make the committee of the lunatic a party to the suit, who is bound to appear and defend, and where the lunatic has not been declared such, the courts have sometimes refused to proceed until he has been found such by an inquisition, and a committee for him appointed.

In 1 Barbour's Chancery Practice, 52, the mode of proceeding is thus stated: "The subpoena against a lunatic must be served on him personally, as in case of an infant. And it should be in presence of some competent person, or with notice to his committee, who must also be made a party defendant as such committee, to suits respecting the lunatic's estate, and who is bound to appear and answer with and for the lunatic, or be attached." "The idiot or lunatic defends the suit by his committee, who is by an order of court appointed guardian *ad litem* for that purpose, as a matter of course, in ordinary circumstances."

552] *The duty imposed on the court, the lunatic being unable to defend himself, is, that they must see, before they proceed to dispose of his rights, that he is represented in court by some competent person, who is bound to make such defense as the nature of the case will permit, and to see that such representative performs his duty in the premises. If the custody of the lunatic has been committed to a guardian or committee whose business it is to look after his interests, and who would naturally be supposed to be possessed of the information necessary to enable him properly to perform his trust, it would appear reasonable and proper that the court should appoint such guardian or committee, guardian *ad litem*, to defend the suit.

It is to be observed, however, that even in cases where the lunatic has a regular guardian, in the absence of statutory enactment on the subject, the practice is for the court to appoint the guardian to defend the particular cause. He does not defend as a matter of course; it is by authority from the court. And, although the court might in most cases feel bound to appoint the general guardian, yet it would appear reasonable that when, in the opinion of the court, the guardian of the lunatic, either on account of his residing out of the jurisdiction of the court, or for any other cause, was not a

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proper person to defend the suit, it should have the discretion of appointing some more suitable person to make the defense. It is not necessary for us to consider what would have been requisite, under our statute relating to the appointment of guardians for lunatics, if Sturges had been a resident of this state; he was a resident of the State of New York. It does not appear that any guardian had been appointed for him in New York, but even if there had, such guardian would not have been under the control of the courts of Ohio. He might have refused to appear and answer and defend. The court in Ohio could not attach him for contempt, nor remove him, in case of his refusal to defend. In such case, the court being bound to see that the lunatic had some person to defend for him, would either have to stay proceedings *indefinitely, [553] or appoint a guardian *ad litem*. There are numerous cases in which the right of the court to appoint a person to defend as guardian *ad litem* for a lunatic appears to be recognized.

The eighth section of the act relating to lunatics (Swan's Stat. 571) substantially provides that the guardian of a lunatic shall be capable of suing and being sued, in reference to the affairs of the lunatic, but makes no provision for the manner of proceeding where a defendant is a foreign lunatic, except giving the power to the guardian of such lunatic to act where he makes the application and exhibits his authority. The court having no positive rule of practice prescribed by legislative enactment, were, as a matter of course, authorized to proceed by the analogy furnished by similar cases. In contemplation of law there is a complete parallel between that of a lunatic and an infant defendant; both are liable to be made defendants, and have their rights passed upon; both are incapable of defending themselves; and in both cases the court before whom the proceedings are had are bound to see that their defense is conducted by a competent person, who must be recognized by the court as authorized to make defence. The legislature have provided (Swan's Stat. 665) that in all cases where an infant is sued a guardian *ad litem* shall be appointed to defend the suit: the present not being a case provided for by statute, we think the court with great propriety adopted the same course provided for in case of infant defendants.

The next question in order is, Was it error in the court to proceed to decree without an answer from the guardian *ad litem*? And in the first place we would inquire, What is the object of giv-

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ing notice to a defendant that a suit is instituted against him? Common sense will at once furnish a complete answer to this question. The defendant must have an opportunity of defending against the claims sought to be enforced against him; he must be permitted to make his response to the charges—his statement of the case, and an opportunity to present his evidence must be given. 554] And *so vitally important is this fact of notice held, that all proceedings of courts, without it, in passing on the merits of a case, are held to be not merely erroneous, but absolutely void. Until the party is thus brought into court, all judgments and decrees made by the court are not respected as the acts of a court. If, however, the defendant has received the notice, which has been prescribed as the proper one in the case, the court are permitted, without any thing being done by the defendant, to proceed and finally dispose of the case. The making defense is the party's own business, and the ordinary presumption is that he has the capacity to make it; and if he makes none, he can reasonably be held to have admitted the claim presented against him. These are vital principles in the proceedings of courts, and without which justice could not be administered. The importance of a party having an opportunity to make defense is the same in the case of a lunatic as in that of a sane person. The same great principle governs in both cases. As we have already remarked, the process of the court gives the lunatic no information of what is claimed against him; he is incapable of receiving any such knowledge; it gives no capacity to defend; he individually can have no such capacity; the process in such case merely gives the court jurisdiction in the case. But the first step, and one absolutely necessary before the court can proceed to determine on the merits of the case, is to give the lunatic the capacity of making defense; this can only be done by a representative; some person must be authorized and required by the court to make defense. It is the duty of the person thus appointed to plead and prove to the court any matters of defense that he may find the case susceptible of. If he knows of no defense, or has no information in the case, he can so state in his answer. There is one thing that he can always do—he can put the case at issue. Being the representative of the defendant, merely for the purpose of making defense, and receiving no authority from the defendant himself, he can admit nothing against the defendant. He can not leave the claim of the plaintiff

*as admitted on record—he must not be in default—he must [555 not leave the lunatic in default; if so, his appointment, on the record itself, is shown to have been a vain thing—both in form and substance to have been a mere mockery. The court, in this instance, appointed a guardian *ad litem*, who accepted the appointment, and was ruled to answer in sixty days. Nothing more is heard of the guardian *ad litem*, until the court render their decree, when they find that he is in default for answer—that Sturges, the lunatic, is also in default for answer; and, in terms, take the bill as to both as confessed. Now, it is not contended that it was not necessary for the court to appoint a guardian *ad litem* to defend, and I suppose it would not be claimed that it would not have been error in the court to have proceeded without such appointment; and yet I can not see that the case is any better by the mere appointment. If the guardian *ad litem* had refused to accept, his appointment would have gone for nothing. He, however, did inform the court that he would accept, and with that his action commenced and ended. He said he would go, but went not. If this kind of proceeding is good, it certainly furnishes a very simple mode of disposing of the case of a lunatic. A majority of the court are of opinion that the court erred in proceeding to take a decree *pro confesso*, on the default of the guardian *ad litem*. We are of opinion that the court should at least have had the answer of the guardian *ad litem* before they proceeded to decree in the case. It is said, however, that the answer of the guardian *ad litem* is a mere formal matter; that he can admit nothing; and that the court are bound to have the claim of the plaintiff proved, whether there be an answer in or not. The question again recurs to us, if it is not necessary that a guardian *ad litem* should act or do anything, why is it necessary that he should be appointed at all? We have attempted to show that the thing of appointing a guardian *ad litem* to defend a lunatic was important and necessary as a matter of principle; but, supposing that the appointment and answer, and all the proceedings in reference to it, were merely formal, still this *would not justify dispensing with them. Forms are [556 the means used for carrying into effect the principles of the law. Error may be committed in dispensing with these formal matters, the same as where there has been an error in principle. How many of the decrees and judgments that have been reversed on error, have been set aside, not because there had been any abstract

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violation of the legal rights of the parties, but merely because some established form of proceeding had been departed from. But was it a matter of no importance that the case should be put at issue? Every lawyer and most litigants understand and appreciate the difference between being in default and being liable to have a decree taken against them *pro confesso*, and having a cause put at issue where it must be tried and disposed of amongst the issues. In this very case, the complainants took advantage of the rule of court which entitles complainants, in case of default, to file a decree *nisi* which is to be confirmed, as a matter of course, in twelve days from the time of filing. After the expiration of the sixty days within which the guardian was ruled to answer, the complainant, under the rule, had a right to take his decree *nisi*, and very shortly after the expiration of that time he did file the present decree. The rule of practice, under which this decree was filed, gave the complainants an opportunity of taking a decree sooner, on account of the default, than they could by possibility obtain it, if an answer had been put in, and the case put at issue.

The complainants then had an advantage by the default, which, we think, should not be permitted against a lunatic. We think, too, the decisions uniformly sustain the proposition that a decree taken against a lunatic or an infant, *pro confesso*, without the answer of his guardian, is erroneous. In the case of *Coleman v. The Comm'rs of the Lunatic Asylum*, 6 B. Mon. 243, the question came directly up, and it was held by the court that it was erroneous to proceed to decree without an answer from the guardian. The court, in that case, says: "Supposing, as we do, that Henry Coleman, the lunatic, was a proper party, it was erroneous to 557] *proceed to a decree against his estate, without an answer from some person appointed to act as a committee for him in the defense of his suit."

In the case of *Harrison v. Rowan*, 4 Wash. C. C. 207, the court very specifically lay down the rule requiring an answer, as follows: "A lunatic, as well as an infant, though both are incompetent, and may be equally so, to act for themselves, must, in cases where their interests are sought to be affected by the decree, be made parties to the suit; and, if as defendants, this can only be done by praying process against them. In the latter case, the court appoints a special guardian to defend him in that suit, and he answers the bill by the guardian so appointed. A lunatic, against whom

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process is issued answers by his committee, under an order of the court appointing him for that purpose. If he has no committee, the court appoints some person as guardian to defend the suit and answer for the lunatic." Counsel for complainants in error have referred us to numerous authorities, where it has been held that it is erroneous to proceed to decree without an answer from the guardian *ad litem* of an infant; we think it unnecessary to refer to many of these cases, as the decisions on this point appear to be uniform. These decisions, too, we consider in point, as there can be no difference in principle, in this particular, between the action of a guardian *ad litem* of an infant and that of a lunatic. In the case of *Beeler v. Bullitt*, 4 Bibb, 11, it is said by the court: "It was clearly irregular to proceed to a hearing of a cause without an answer having been previously filed, on behalf of infants, by their guardian, and without any further proceedings being had against them after the order appointing their guardian. This irregularity is not cured by the subsequent appearance of the defendants by their attorney. The cause must, therefore, not only be reversed but remanded to the court below for new proceedings, to commence at the order appointing a guardian." In the case of *Healy v. Gore*, 4 Dana, 133, the court hold that the case was prematurely heard; the guardian who *had appeared for the infants not [558 having answered, and say "It was the duty of the court to compel an answer or to appoint some other person guardian to defend, and to defer the hearing of the cause until after a proper answer had been filed."

The case of *Ullery v. Blackwell's Heirs*, 3 Dana, 300, is equally explicit on this point. The case of *Massie v. Donaldson*, 8 Ohio, 377, is in point and to the same effect.

It is said, however, that the court should not regard this as a decree *pro confesso*; but that the decree shows that evidence was heard, and that the court, from the record itself, should presume that the mortgage, notes, and all the evidence and exhibits necessary to make out complainant's claim, was before the court below. To this we would say, in the first place, that we do not see how this decree can be considered in any other light than a decree *pro confesso*. The decree is filed by the complainants as a decree *nisi*, taking the bill as confessed; such decree can only be had where the complainant has a right to take the bill as confessed and treat the defendant as in default. The interest is calculated on the claim

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up to the filing of the decree *nisi*, and the decree draws interest from that date. The court most explicitly say that they do find that the lunatic and his guardian are in default, and that the bill, as to them, is taken as confessed. Here we have the expressed statement of the court, the acts of the court, and the acts of the complainants, all treating the case as an ordinary case of default, and taking a decree by confession. But the decree says that the case came on for hearing on the bill, answer of Anderson, replication thereto, exhibits, and testimony; and it is contended that we are to presume that the case was treated by the court as on hearing, and the decree rendered on ample testimony, as to Sturges as well as the other defendants. But how can any such presumption be raised from the language of the decree? Anderson had put the case at issue previous to the time that the guardian was appointed for Sturges; the case came regularly on for hearing, so far as he 559] was concerned, and it is perfectly consistent*with the decree, that the evidence was offered and the case heard merely as to Anderson's right, without reference to the rights of Sturges. But if evidence was offered as to Sturges and his rights, who was then acting on his behalf to make a computation of the claims with which he was sought to be charged, and to see that they were properly proved? Where was his guardian? Are we to presume from the decree that he was present, representing the rights of Sturges? As the case stood, we suppose that if the court could have proceeded to make a disposition of it, they must do just as they did: find the default, and enter the decree *pro confesso*. They might, for their own satisfaction, afterwards hear evidence to sustain the plaintiff's claim; it would still, however, be a decree taken on a default, and *pro confesso*.

In New York it has been held that the hearing of evidence to sustain a plaintiff's claim in a case of default and bill taken *pro confesso*, is a matter of which the defendant need have no notice, having no rights that he can claim in reference to the hearing of such evidence; it is merely for the satisfaction of the court. 4 Johns. Chy. 548.

Our own statute, Swan, 705, sec. 17, relating to the hearing of evidence on default, and petition taken as confessed, treats the subject in the same way—leaves it discretionary with the court to hear evidence or not, and permits them to hear evidence that on a regular hearing of the cause against the defendant would not be ad-

missible. But in judicial proceedings, as in other matters, there is a time for everything. And evidence offered before the ground is laid for its introduction, no matter how ample and complete it may be, amounts to nothing; and if we are right in our former proposition, that the court could not proceed without an answer from the guardian *ad litem*, it is of no consequence how much evidence was offered against Sturges, it was error to hear it out of time.

Suppose, in an ordinary case, a complainant takes a decree by default before the time that he is authorized to do it, would it cure his case of error, that the record showed that the court, at the time the decree was taken, had the most complete and conclusive evidence of the claim of the *complainant? And if the court [560] could not take a decree against Sturges, without an answer from his guardian *ad litem*, any amount of evidence that they might hear against him would not cure the case. Sturges was not placed in a situation that evidence could be heard against him.

It has been objected to this proceeding, however, that Anderson is not a proper party to the bill of review. It is a general rule that where different persons are interested in an account, whether in the same right or not, they should all be made parties as mortgagors, mortgagees, etc. Story's Eq. Pl. sec. 219.

It is further laid down that, where persons are affected by a common charge or burden, they must ordinarily be made parties, not only for the purpose of contesting the right or title to it, but also for the purpose, if it should be established, of a contribution towards its discharge among themselves. Story's Eq. Pl. sec. 162. In 3rd J. J. Marsh. 302, it is held that where a mortgage is executed by two, both should be made parties to a bill to foreclose. Sturges and Anderson were both necessary parties in the original proceedings; they were equally so in the bill of review. The supreme court of the United States lay it down as an unquestionable principle that all the parties to the original decree ought to join in the bill of review to reverse it. 8 Pet. 267.

The interests of Sturges and Anderson are so inseparably connected, that it is impossible to render any decree in the case without affecting the interests of each. The decree could not be reversed as to the interests of Sturges, without a reversal of the whole decree. It has been said that their holding the property as tenants in common does not prevent them from severing. But the

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difficulty of a severance does not arise so much from the character of their estate, as from the nature of the obligation which they have jointly assumed. Sturges and Anderson were each liable to Longworth and Horne for the whole debt, they jointly mortgaged the property in controversy to Longworth and Horne for its security. Each of them had a right to have the whole of the property appropriated to the payment of the debt. If *treating Sturges and Anderson as tenants in common (as they are), we were to hold that the original decree shall stand as to Anderson, and that one-half of the property was appropriated by that decree, Sturges would have to pay the whole debt to redeem one-half of the property. He would have but one-half of the property to appropriate toward the payment of the whole debt. It is true that part of the debt has been paid by the sale of the property, but this makes no difference in principle; there might have been none of it appropriated in that way.

If the severance of interest is to take place, how much of the mortgage is to be paid by Anderson's half? It has not been sold; it has not been valued. There is no connection between the price bid for the whole and the one-half of the property. There was no severance by which Anderson could have redeemed his share of the property by paying his share of the debt. In case of severance, how would the account stand between Sturges and Anderson? Certainly very different from anything that could have arisen out of their original contract. If a severance was to be made, a new decree would have to be entered even as to Anderson's interests, both as respects the property and the debt. A court of chancery may adapt itself to the particular circumstances of a case in separating interests that are susceptible of division, but a court of chancery is equally impotent with a court of law in making new contracts, changing the nature of obligations, or separating interests that are in their nature legally indivisible. If Sturges has a right to have the decree reversed, he has a right to be placed in the same situation that he was in before its rendition; this can only be done by an entire reversal of the whole decree.

The bill of review, however, was filed more than five years after the original decree, but within five years from the removal of Sturges' disability. This presents the question whether the rights of Anderson are saved by the disability of Sturges? Or whether Anderson, laboring under no disability, the action being necessarily

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joint, the limitation is not a *bar to the rights of both? In [562 the case of *Martseller v. McLean*, 7 Cranch, 156, it was held that where the statute had run as to one of several joint tenants, who were all necessary parties to a suit respecting their estate, the limitation operated on all, and that the right of action was barred. The supreme court of this state, however, in the case of *Wilkins v. Philips*, 3 Ohio, 49, took the opposite ground, and held that if any one of the parties who sue a writ of error is within the proviso that takes the case out of the statute of limitations, the case is saved for all the parties. The court in that case refer to the case of *Martseller v. McLean*, and also the case of *Perry v. Jackson et al.*, 4 Term, 516, on the authority of which *Martseller v. McLean* was decided, and say that they can not adopt the principle laid down in those cases, but agree with the reasoning of the courts of Connecticut and Kentucky that had adopted the contrary rule. This decision in the case of *Wilkins v. Philips* has been followed ever since in this state, and has been confirmed by repeated decisions, and may be considered as well settled law. In the case of *Massie's Heirs v. Matthews' Executors*, which was a bill of review, the court held that the right of reversal was an entire thing, and that some of the plaintiffs in review being within the proviso of the statute, the saving inured to the benefit of all. The same question arose in the case of *Meese v. Keefe*, 10 Ohio, 362, and the court there lay down the rule thus: "Where common interests can be severed, the protection extends no further than to him within its provisions; but where no such severance can be made, and the protection of the statute can not be secured without covering other interests, the benefit of the statute claimed by one avails all; it is so in a writ of error, which is an entire thing." In *Moore v. Armstrong* the same principle is stated, and the case of *Wilkins v. Philips* is referred to and approved.

A majority of the court are of opinion that the court of common pleas, in proceeding to take a decree *pro confesso* without an answer from the guardian of the lunatic, *committed an error: That [563 the interests of Sturges and Anderson can not be separated, but that they are both necessary parties to the proceeding in review; and that Sturges coming within the proviso of the statute, Anderson's rights, as a necessary consequence, are also saved. We have thought it unnecessary to proceed further in the examination of

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the assignment of errors. The decree will therefore be reversed, and the case remanded for further proceedings.

Decree reversed.

Judges THURMAN and RANNEY dissented.

**HENRY DEBOLT, TREASURER OF HAMILTON COUNTY v. THE OHIO
LIFE INSURANCE AND TRUST COMPANY.**

A tax, regularly assessed under the act of March 21, 1851, to tax banks and bank and other stocks the same as other property, is not remitted by the repealing clause of the act of 18th April, 1852, for the assessment and taxation of all property in this state, and for levying taxes thereon according to its true value in money.

The remedy, by bill in chancery, provided by the first named act, for the collection of taxes assessed against the Ohio Life Insurance and Trust Company, and re-enacted in the last, may be resorted to for the collection of taxes assessed in 1851, and remaining unpaid after the passage of the act of 1852.

The 60th section of the act of February 24, 1845, to incorporate the State Bank of Ohio and other banking companies, contains no pledge on the part of the state not to alter or change the mode or amount of taxation therein specified; but the taxing power of the general assembly over the property of companies formed under that act remains the same as over the property of individuals.

But, if it had contained such pledge, involving a surrender of the right of taxation, it would be inoperative for want of constitutional power in the general assembly to make it.

This right, vital to the existence of every government, and one of the most important incidents of sovereignty, has only been delegated to the general assembly *to be used* for the purpose of accomplishing the lawful objects with which it is charged.

It can only be exercised to raise money for these purposes; and any attempt to use it otherwise, or to control or abridge the *right itself*, is beyond the delegation, and an unauthorized assumption of power.

564] *No control over its exercise has been conferred upon the federal government by article 1, section 10, of the constitution of the United States, prohibiting the states from passing laws impairing the obligation of contracts, or by any other clause of that instrument.

In any view, therefore, which can be taken, the act of 1851 is a constitutional and valid law.

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CHANCERY. Reserved in Hamilton county.

Morris & Rairden and Pugh, attorney-general, for the complainant.

Worthington & Matthews and Stanberry, for the defendant.

RANNEY, J. The complainant, as treasurer of Hamilton county, seeks, by this bill, to recover of the defendant the amount of tax assessed for the year 1851 upon its capital stock loaned in that county, and upon the surplus and contingent fund belonging to the company, under the provisions of the act of March 21, 1851, "to tax banks and bank and other stocks, the same as other property is now taxable by the laws of this state."

Two points of defense are made, and claimed to be established; 1st. That there is not now, and was not at the filing of the bill, any subsisting tax against the company, or, if there was, that the remedy by bill in equity could not be pursued. 2d. That the act under which the tax was levied was unconstitutional and void.

That the tax was actually levied and remains unpaid, and that this remedy was given for its collection by that act, is admitted; but the position is rested solely upon the repealing clause of the act of April 13, 1852, "for the assessment and taxation of all property in this state, and for levying taxes thereon according to its true value in money." The 77th section of this latter act, after referring to several tax laws, and amongst them the act of 1851, by their titles, concludes thus: "And all parts of laws superseded by this act, and inconsistent therewith, are hereby repealed."

In support of the position, it is argued that this effected an entire repeal of the act of 1851, without any saving whatever; *and, as a consequence, all accruing rights not closed and [565] perfected fell with it; and that the tax in question must be so regarded, and being a proceeding, if not penal in its character, entirely statutory, the legislature have, in effect, remitted it by the repeal of the law under which it was levied; but, if not remitted, this remedy, unknown to the ordinary jurisdiction of a court of equity, is at least gone. So far as the objection goes to the continued existence of the tax, it is equally applicable to all the delinquent taxes in the state, upon every species of property, remaining unpaid at the time the repealing section was enacted.

A conclusion so unjust, and working such disastrous consequences, ought not certainly to be hastily adopted, and not at all, if

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it can be avoided without violating any established principle of law.

But are the premises correct from which it is drawn? In the first place, it is very far from being as clear as is assumed that the repealing clause is absolute in its terms. It is certainly very inartificially worded; but no violence would be done to the language by extending the clause quoted to the acts named in the previous part of the section, as well as all other acts upon the subject, and holding that only so much and such parts of any of them were intended to be repealed as were "superseded by" and "inconsistent" with that act. In aid of this construction, well-established principles might be invoked. Whether the repeal of a statute is absolute or modified, is always a question of legislative intention; and the legislature will not be presumed to have intended an absurd or unjust consequence. The language, if clear, it is true, must govern; but strict grammatical accuracy need not be observed; and if it will bear a construction consistent with justice and right, although not in strict accordance with the words used or their arrangement, the courts are not only permitted, but bound to presume the legislature intended such construction to be put upon them. But, however this may be, it is admitted to be an established rule that the 566] repeal of a statute will not destroy or affect *rights already vested under it; but all acts done and perfected while it was in force will remain good and effectual. It is very clear to us that this tax became a vested right in the public, fully perfected within the meaning of this rule long before the passage of the act of 1852, and could not be affected by the repeal of the law under which it was levied, however absolute that might be. Every act required of the public authorities in the assessment and levy had been done, and the liability of the defendant fully fixed. Nothing remained but the payment of the money; and the failure of the defendant to do this surely could not render imperfect the right of the public to receive it, which is as clearly a vested right as though the debt were reduced to possession. Nor does it partake in the slightest degree of the character of a penalty. The obligation of every citizen to contribute, in proportion to his property, to the support of the government which protects him in its enjoyment, is not only a high moral duty, but arises necessarily from the compact into which he has entered with his fellow-citizens, and for which he receives, not only in contemplation of law, but in fact, a valuable-

consideration. It is a common burden assumed by all, and levied equally upon the property of all—the infant and law-abiding, as well as the law-breaking; while a penalty in its very nature implies a *punishment* for a wrong done or duty omitted. When a part have paid their portion towards the discharge of the common burden, an obligation of the most equitable character arises against the balance, who have equally shared the benefit, to contribute theirs; and its enforcement is no nearer the *punishment* implied in a penalty, than that of a somewhat similar obligation arising between joint debtors or co-sureties.

The *right* to the tax still remaining, a *remedy* must somewhere exist to collect it. We are of opinion that the provisions of the act of 1851 may be regarded as having a temporary continuance for the enforcement of the rights which accrued under it; upon the principle settled in *Moore v. Houston*, 3 Serg. & R. 185, where it was held that, though an act repeals a former act, yet, if it [567] appears upon the whole that the legislature intended certain parts of the former act to have a temporary continuance, it is not an immediate repeal as to such parts. And this view is rendered nearly conclusive from the fact that the legislature literally re-enacted those provisions in the act of 1852; and thus the case is brought within the principle settled by the late court in bank, in *Mitchell v. Eyster*, 7 Ohio, 257. And, while it is true that these provisions in the last law do not in terms extend beyond the enforcement of taxes assessed under its provisions, yet taken in connection with the former, it is a sufficiently clear expression of legislative intention, that this should continue to be the forum employed for the collection of unpaid taxes assessed under either law.

This brings us to the main question in the case: Was the tax legal when assessed? The solution of this question is made to depend entirely upon the answer to be given to another; Was the act under which it was levied a constitutional enactment? The object and principal provisions of this act may be very shortly stated. It makes it the duty of the president and cashier of each banking institution in the state having the right to issue bills or notes for circulation, annually to list and return to the assessor, in the township or ward where the bank is located, the amount of capital stock at its true value in money, together with the amount of surplus and contingent fund belonging to such institution; upon which the

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same amount of tax is to be levied and paid as upon the property of individuals.

By the 3d section, the Ohio Life Insurance and Trust Company is brought within the provisions of the act, and subjected, in any of the several counties where its capital stock is loaned, to the average rate of taxation for all purposes levied in such county, upon the amount so loaned.

The 5th section provides that "the taxes levied and collected in pursuance of the provisions of this act shall be in lieu of any taxes which such bank or banking company would, by existing laws, be required to pay on its dividends or profits."

568] *Upon the abstract justice of this tax, aside from any constitutional inability to impose it, there can scarcely be two opinions. The same amount, and for the same purposes, is imposed upon money employed in banking as upon all other property. No tax whatever is levied upon the valuable franchises enjoyed by these institutions; nor is it pretended that any bonus or other pecuniary consideration was ever paid the state for them. But the question of power to impose it is fairly raised, and must be determined upon its own merits. The act is claimed to impair the obligation of certain contracts existing between this institution and the state, by which the state has limited its right to tax the institution beyond a certain amount, and in a certain specified manner—that this act alters the mode and increases the amount, and is therefore in conflict with art. 1, sec. 10, of the constitution of the United States; and a corresponding provision in art. 8, sec. 16, of the constitution of this state, then in force.

These contracts are said to be found in the charter of the company; in the first section of the act "to prohibit the circulation of small bills," passed March 14, 1834, 1 Curwen's Rev. Stat. 256, and in the 60th section of the act to incorporate the State Bank of Ohio and other banking companies, 43 Ohio L. 24, passed February 24, 1845. A brief reference to the provisions of these acts will exhibit the strength of the position assumed.

The company was incorporated February 12, 1834, with a capital stock of two millions of dollars, and empowered to make insurance on lives—to grant and purchase annuities—to make other contracts involving the interest or use of money and the duration of life—to receive money in trust either from individuals or by order of any

court of record—to buy and sell drafts and bills of exchange—and to hold real estate necessary to the transaction of its business.

By the 23d section it was invested with banking powers until the year 1843, and authorized to issue notes and bills, under the regulations and to the amount therein specified.

*The only provision relating to taxes is found in the 25th [569 section, which reads: "No higher taxes shall be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking institutions in this state."

By the section of the act of 1836 referred to, the auditor of state, after receiving the statement of the dividends of the several banks of the state, was required to draw on them for the amount of twenty per cent. on such dividends for taxes; but if, within a time limited, any bank should surrender its right to issue or circulate small bills, he was authorized to draw on such bank for only five per cent. on its dividends declared after its surrender.

The 60th section of the act of 1845 provides that, "Each banking company, organized under this act, or accepting thereof, and complying with its provisions, shall semi-annually, on the days designated in the 59th section for declaring dividends, set off to the state six per centum on the profits, deducting therefrom the expenses, and ascertained losses of the company for the six months next proceeding; which sum or amount so set off shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject.

From these several acts, two separate and distinct contracts are claimed to be established, the first growing out of the surrender by the company of the right to issue small bills under the act of 1836, and limiting the state to five per centum on its dividends; and the other arising under the act of 1845, fixing the rate of taxation upon the banks organized under its provisions, which, it is insisted, could not subsequently be changed without their consent, and which, by the charter of this company, became its rule of taxation; limiting the state to six per centum on the net profits

I. Aside from the considerations alluded to hereafter, and assuming as correct all that is claimed for the act of 1836, we are clearly of opinion that it had no application to this company after 1843, and is consequently ineffectual to *sustain the claim made [570

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under it. The object of the law, as indicated in its title, was to suppress the circulation of small bills. To obtain this it levies a higher annual tax upon the banks that continue to issue them than upon those that surrender the right. The proposal is made to no bank by name, but to every bank of circulation having the right conferred by its charter to issue or circulate these bills and to no others. This institution, then, had that right, and may properly be numbered with those to whom it was addressed. But this right ceased to exist in 1843, and with it the law ceased to have any further application. It then became strictly what its name imports, a life insurance and trust company without any such banking powers whatever. It no longer came within the policy of the law or its terms; and to apply the law longer to it would be to subvert both. As a bank having the right to circulate small bills, it was addressed in common with others of like character; as such bank, it surrendered the right; and as such bank it has long since ceased to exist. As long as the right endured, it received the stipulated equivalent annually in the reduced tax; and it can certainly make no difference that all its corporate powers for other purposes did not cease at the same time with its banking powers.

II. The claim made under the act of 1845 is of much graver importance, and in its investigation questions have been raised and discussed of the most vital importance to the state and the people. On the one hand, the state, by statutes and constitutional provisions, has constantly claimed the right to impose taxes upon the property of companies formed under it, equal to and in common with those imposed upon the property of individuals; and to vary them from time to time as the exigencies of the state might require. On the other, this claim has been as constantly opposed by these institutions. Insisting upon the section already quoted, as a contract between them and the government, they have uniformly denied the power of the state to change it in any particular. The 571] question is now, *for the first time, presented in this court, and we have endeavored to give it the consideration its importance demands, so far as other pressing duties would permit.

It is admitted by counsel for the company that "the taxes levied upon the capital stock or dividends of incorporated banks in Ohio in 1851, when this tax was assessable, gives the rule of taxation against the company;" and it is not denied that this tax was levied in conformity to the act of 1851, and is the same to which the banks

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were subjected. But if that act was invalid, as is claimed, the act of 1845 continued in force and was applicable to much the largest number of banks in the state. It is very questionable whether the principle upon which the admission proceeds might not be carried much further, and to a point entirely fatal to the defense. On the same day upon which the act of 1851 was passed, the general assembly passed a law "to authorize free banking," under which a number of banks were immediately formed; which were undeniably subjected to taxation under the former law. If counsel are correct, two rules of bank taxation were in force in Ohio in 1851—one for the banks of 1845, and the other for those of 1851; and both were "incorporated banking institutions." Which of these should furnish the rule for this company? To whom did the choice belong? The charter is silent upon the subject, and we do not find it necessary, in the view we take of the case, to settle the question.

The whole case is thus made to depend upon the answer to be given to the question, Did the 60th section of the act of 1845 constitute a contract within the meaning and under the protection of the constitutional provisions relied upon between the state and the banks formed under it, by which the state is bound not to change the mode or amount of taxation therein provided?

That the state may be a property-holder, and may purchase or sell by contract, or borrow money and employ the personal services of individuals in the accomplishment of its lawful purposes; and that all such engagements, whether *executed or executory, bind it [572] in the same manner and to the same extent as though made by an individual, and are equally protected by the constitution of the United States, are propositions too reasonable in themselves to be doubted, and too firmly settled by authority ever again to be drawn in question.

No question upon such a contract arises in this case; nor does the much controverted question arise, whether the grant of corporate powers to private corporations may be subsequently altered or revoked in the discretion of the general assembly; and we therefore express no opinion upon it at this time.

The position of counsel for the company is "that where property by charter or by grant from a state, or by contract made under a law of a state authorizing it, is exempted from taxation, or a limited taxation is thereby prescribed, then, in case of exemption, it can

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not be taxed ; nor, if limited, can it be taxed otherwise than authorized by the terms of the limitation." In short, the legislature of 1845 had the power, and have exercised it, to limit the right and to release in part from the burden of taxation imposed upon other property, money invested in these banks during the continuance of their charters ; and this limitation is binding, not only upon all succeeding legislatures, but also upon the people themselves, in the reconstruction of the fundamental laws of the state. Did that legislature attempt this ? And, if so, had they the power to make it effectual ? To answer in the affirmative we must find terms sufficiently strong to indicate such an intention used between parties competent to contract and in relation to a lawful subject-matter of contract.

1. The first question involves a construction of the section quoted, in the light of the balance of the enactment, and with reference to tax laws then existing. This act, embracing seventy-five sections, is very far from being confined to the creation of companies and conferring corporate powers. It undertakes to regulate the whole business of banking in the state, and to prescribe the duties and obligations of those engaging in it. It not only determines the 573] amount to be *contributed for taxes, but also defines and punishes sundry offenses with imprisonment in the penitentiary. It thus covers ground properly belonging to revenue laws and the penal code. To assert that all these multiplied regulations, civil and criminal, of a great branch of business, belonged to the unalterable franchises of those banks would be simply absurd.

It is not denied, and certainly can not be, that laws were in force at the time the act of 1845 was passed, which, if it had been silent upon the subject, would have subjected the banks formed under it, or the stock held in them, to taxation in common with other property.

With these materials for properly construing the sections in view, the principles by which we should be guided have been very clearly settled by the supreme court of the United States. A grant from the government is claimed ; not a grant of property, but a surrender of sovereign power. In *Providence Bank v. Billings*, 4 Pet. 561, where the same claim was made and disallowed, Chief Justice Marshall, delivering the unanimous opinion of the court, says : "That the taxing power is of vital importance—that it is essential to the existence of governments—are truths which it can not be

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necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed."

We will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished," that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

"Any privileges which may exempt it (the corporation) from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

*In the case of *The Stourbridge Canal v. Wheely*, 2 Barn. [574 & Ad. 793, quoted and approved in *Charles River Bridge v. Warren Bridge*, 11 Pet. 544, it is said: "This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this: 'that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing that is not clearly given them by the act.'" And Chief Justice Taney in the latter case affirms this rule of construction to be well settled, both in England and by the decisions of our own tribunals. And he very pertinently adds: "It would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charters, the courts of this country should be found enlarging those privileges by implication, and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice." In this case, a surrender of the right of eminent domain was claimed upon the ground that it might be, and had been so used as to destroy the value of the franchise granted to the corporation. The case of *Providence Bank v. Billings* was considered as settling the principle adversely to the claim; and, in respect to it, the chief justice remarks: "It may, perhaps, be said that, in the case of the Providence Bank, this court were speaking of the taxing power, which is of vital importance to the very existence of every government. But

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the object and end of all government is to promote the happiness and prosperity of the community by which it was established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created." "A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an 575] *interest in preserving it undiminished." "The continued existence of a government would be of no great value if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations." "Whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same." "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation."

The admirable clearness and force of these extracts leave nothing to be added, except to say the same rule of construction has been repeatedly adopted and applied by the courts of this state. *Bank of Chillicothe v. Swayne*, 8 Ohio, 286; *Ohio v. Granville Alexandrian Society*, 11 Ohio, 12; *Kemper v. Turnpike Co.*, Id. 393.

Governed by this settled rule of construction, we proceed to apply it to the section of the act of 1845 relied upon. It must be admitted the section contains no language importing a surrender of the right to alter the taxation prescribed, unless it is to be inferred from the words, "shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject;" and it is frankly conceded that if these words had occurred in a general law, they would not be open to such a construction. If the place where they are found is important, we have already seen this law is general in many of its provisions, and upon a general subject. Why may not this be classed with these provisions, especially in view of the fact that, in its nature, it properly belongs there? We think it should be, and regarded as a law prescribing a rule of taxation until changed, and not a contract stipulating against any change; a legislative *command*, and not a legislative compact, with these institutions.

576] *The taxes required by this act are to be "in lieu of"

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other taxes: that is, take the place of other taxes. What other taxes? The answer is, such as the banks or the stockholders "would otherwise be subject" to pay. The taxes to which they would otherwise be subject were prescribed by existing laws; and this, in effect, operated to repeal them, so far as these institutions were concerned. This is the natural and obvious application of the language, and is the same language, used for the same purpose, in the act of 1851. That the general assembly intended only this, and did not intend it to operate upon the sovereign power of the state, or to tie up the hands of their successors, we feel well assured. To suppose the contrary, would be to impeach them of gross violation of public duty, if not usurpation of authority. The taxes imposed were, at the time, much less than those imposed upon other property less profitably employed; and this disproportion has been growing greater every year, without the least expectation of any diminution during the continuance of these charters. That a body of men, representing the whole people, and all interests, deliberately intended, without one dollar of consideration paid to the state, to perpetuate this inequality, and to continue such marked injustice, beyond the power of remedy, for twenty years, ought not to be believed without the most cogent evidence. If they had so intended, it would never have been left by the able and experienced men at whose instance the law was enacted, to be made out by dubious and uncertain construction. Our legislation has furnished numerous examples, with which they were very well acquainted, of attempts to limit the taxing power; but in all of them plain and unequivocal language, admitting of no construction, has been used. A single example will serve to illustrate them all. By the 42d section of the act of 23d February, 1816, to "incorporate certain banks therein named," 2 Chase, 925, it is declared that the banks therein named, accepting and complying with the provisions of the act, "shall be *and remain* exempt and free from the payment of any tax *to be imposed* and collected by any other law of this state."

*If this construction of the section should not be deemed [577 conclusively correct, still candor must compel the admission that it is at least doubtful, if it is not; and that the deliberate purpose of the state to abandon this vital right does not clearly and unequivocally appear. If even this is so, the law compels us to re-

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solve all doubts in favor of the public, and to hold that the exemption does not exist.

No case has been cited, and we hazard nothing in saying none exists, in which language so inconclusive and uncertain has been held to effect a surrender of this right; unless the case of *The State v. The Commercial Bank of Cincinnati*, 7 Ohio, pt. 1, 125, should be thought to be an exception. But this decision has not been regarded, by at least one-half the court that made it, as a correct exposition of the law, and, with the utmost respect for that court, is not so regarded by us.

The answer thus given to the first question propounded, finding no attempt to surrender the taxing power over these institutions, decides this case, and renders it strictly unnecessary to consider the last. But as that, also, has been discussed and considered, and involves considerations of great importance, we do not deem it improper to express our views upon it.

2. The remaining question, more fully stated and directly applied, is this: Had the general assembly power, under the constitution then in force, permanently to surrender, by contract, within the meaning and under the protection of the constitution of the United States, the right of taxation over any portion of the property of individuals, otherwise subject to it?

Our observations and conclusions upon this question must be taken with reference to the unquestionable facts that the act of 1851 was a *bona fide* attempt to raise revenue by an equal and uniform tax upon property, and contained no covert attack upon the franchises of these institutions. That the surrender did not relate to property granted by the state, so as to make it a part of the 578] grant for which a consideration *was paid, the state having granted nothing but the franchise, and the tax being upon nothing but the money of individuals invested in the stock; and that no bonus or gross sum was paid in hand for the surrender, so as to leave it open to controversy that reasonable taxes, to accrue in future, were paid in advance of their becoming due. What effect a different state of facts might have, we do not stop to inquire. Indeed, if the attempt has here been made, it is a naked release of sovereign power, without any consideration or attendant circumstance to give it strength or color; and, so far as we are advised, is the first instance where the rights and interests of the public have been entirely overlooked.

Under these circumstances, we feel no hesitation in saying the general assembly was incompetent to such a task. This conclusion is drawn from a consideration of the limited authority of that body, and the nature of the power claimed to be abridged.

That political sovereignty, in its true sense, exists only with the people, and that government is "founded on their sole authority," and subject to be altered, reformed, or abolished only by them, is a political axiom upon which all the American governments have been based, and is expressly asserted in the bill of rights. Such of the sovereign powers with which they were invested as they deem necessary for protecting their rights and liberties, and securing their independence, they have delegated to governments created by themselves, to be exercised in such manner and for such purposes as were contemplated in the delegation. A part of this power has been delegated to the federal and a part to the state governments; neither is thereby made sovereign or independent; but they are strictly dependent and subordinate organizations. That these powers can neither be enlarged nor diminished by these repositories of delegated authority, would seem to result inevitably from the fundamental maxim referred to, and to be too plain to need argument or illustration. If they could be enlarged, government might become absolute. If they could be diminished or abridged, *it might be stripped of the attributes indispensable to enable it to accomplish the great purposes for which it was instituted. And in either event the constitution would be made either more or less than it was when it came from the hands of its authors; being changed and subverted without their action or consent. In the one event its power for evil might be indefinitely enlarged; while in the other its capacity for good might be entirely destroyed, and thus become either an engine of oppression, or an instrument of weakness and pusillanimity.

The government created by the constitution of this state, although not of enumerated, is yet one of limited powers. It is true the grant to the general assembly of "legislative authority" is general; but its exercise within that limit is necessarily restrained by the previous grant of certain powers to the Federal government, and by the express limitations to be found in other parts of the instrument. Outside of that boundary it needed no express limitations, for nothing was granted. Hence this court held, in *Cincinnati, Wilmington, etc. R. R. v. Clinton Co.*, ante 77, that any act passed

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by the general assembly, not falling fairly within the scope of "legislative authority," was as clearly void as though expressly prohibited. So careful was the convention to enforce this principle, and to prevent the enlargement of the granted powers by construction or otherwise, that they expressly declared in art. 8, section 28: "To guard against the transgression of the high powers we have delegated, we declare that all powers not hereby delegated remain with the people." When, therefore, the exercise of any power by that body is questioned, its validity must be determined from the nature of the power connected with the manner and purpose of its exercise. What, then, is the taxing power? And to what extent, and for what purposes has it been conferred upon the legislature? That it is a power incident to sovereignty—"a power of vital importance to the very existence of every government"—has been as often declared as it has been spoken of. Its importance is 580] not too *strongly represented by Alexander Hamilton, in the 30th number of the Federalist, when he says: "Money is with propriety considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most important functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue; either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and in a short course of time perish."

This power is not to be distinguished in any particular material to the present inquiry from the power of *eminent domain*. Both rest upon the same foundation—both involve the taking of private property—and both, to a limited extent, interfere with the natural natural right guarantied by the constitution, of acquiring and enjoying it. But, as this court has already said in the case referred to, "neither can be classed amongst the independent powers of government, or included in its objects or ends." No government was ever created for the purpose of taking, taxing, or otherwise interfering with the private property of its citizens. "But charged with the accomplishment of great objects, necessary to the safety and prosperity of the people, these rights attach as *incidents* to those objects, and become indispensable *means* to the attainment

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of those ends." They can only be called into being to attend the independent powers, and can never be exercised without an existing necessity."

A single example will illustrate this position. It is sacred duty of government to administer justice, and to facilitate social and business intercourse, by the construction of roads; and these may be classed amongst the great objects of its institution. To accomplish the first, money must be had; and the last, land in addition. To obtain them, resort may be had to the private property of the citizen, and it may *be taken for either under prescribed [581 regulations. But can it be doubted, if taken in either way, without such legal and clearly-defined object to which to refer it, that the taking would involve a usurpation of authority which would render it illegal.

This view of the nature of these powers enables us to see clearly to what extent and for what purposes they have been delegated by the general assembly.

They have been delegated, so far as was necessary, to accomplish every lawful object with which the government was charged, and for the purpose of attaining its authorized end. They were delegated *to be used* for these purposes, and these alone. Any control over them for any other purpose is beyond the delegation, and an unauthorized assumption of power. To this extent, and no further, have the people assented to interference with absolute dominion over their property.

The whole argument for the company is based upon the erroneous assumption, that while the people "themselves could, by contract, surrender or yield up any portion of their incidental right of taxation," they could and have conferred the same power upon the general assembly. It is not necessary to say what the people might have done; the question is, what have they done? It need not be doubted that they might have conferred upon that body much more extensive powers over their persons and property than they have done; and it is probably quite as clear that a wiser posterity might correct the indiscretion of their ancestors by a reconstruction of the fundamental law.

To sustain this power in the general assembly would be to violate all the great principles to which I have alluded. It would affirm its right to deal in and barter away the sovereign right of the state, and thereby, in effect, to change the constitution. When the general

assembly of 1845 convened, it found the state in the unquestioned possession of the sovereign right of taxation, for the accomplishment of its lawful objects, extending to "all the persons and property belonging to the body politic."

582] *When its successor convened in 1846, under the same constitution, and to legislate for the same people, if this defense is available, it found the state shorn of this power over fifteen or twenty millions of property still within its jurisdiction and protected by its laws. This and each succeeding legislature had the same power to surrender the right as to any and all other property; until at length the government, deprived of everything upon which it could operate, to raise the means to attain its necessary ends, by the exercise of its granted powers, would have worked its own inevitable destruction beyond all power of remedy, either by the legislature or the people. It is no answer to this to say that *confidence* must be reposed in the legislative body, that it will not thus abuse the power. "But," in the language of the court in *McColloch v. Maryland*, 4 Wheat. 316, "is this a case of confidence?"

We are only bound to exercise this virtue within the limits of the powers conferred. As all delegated authority is liable to abuse, a wise people will never part with more than is necessary to secure their happiness and safety; and they should never be presumed to have conferred a power upon the government not necessary or useful for their purposes, and which may be employed to their destruction as a people. In our opinion, this power has never been conferred, and its exercise by that body is as clear a departure from the spirit and terms of the authority granted, as would be the sale of a chattel by a bailee for hire.

Again, there was nothing in existence to be released or surrendered. Even the naked right can only be called into being when it is needed to attend an authorized object, and then, only to be used for its accomplishment. It comes into life with the object as its incident; adheres to it, and ceases with its accomplishment until it is again needed for a like purpose. To separate them is as impossible as to separate the shadow from the substance; or the end to be attained from the *only means* for its attainment.

The same necessity that required the employment of taxation as 583] a means, when the constitution was formed, *continues with unabated force, and will as long as the government endures. But no necessity or propriety then existed or exists for control over the

right, or to use it *for any other purpose*. And this seems to us to mark very clearly the boundary of power; and to confine it to cases where an obvious connection between the means and the end can be shown, and that the government has power to *exercise* the right, but no power whatever over the *right itself*. This makes the power just as broad as the necessity for its employment, and it denies it only where it might be used, as a weapon of offense, to subvert the government or invade other fundamental rights. For every surrender of the right to tax particular property not only tends to paralyze the government, but involves a direct invasion of the rights of property of the balance of the community, since the deficiency thus created must be made up by larger contributions from them to meet the public demand.

If these views are correct, and we think they are, it appears very conclusive that no contract, within the meaning of the constitution of the United States, abridging the right of taxation, could have been made by the act of 1845, whatever its language might have been. Indeed, we feel very confident that no control over the right of taxation by the states was intended to be conferred upon the general government by the section referred to or any other, except in relation to duties upon imports and exports. It is very manifest, from the history of the times, that if such control had been apprehended the instrument might have met with a very different fate.

After its adoption by the convention, and while it was pending before the people of the several states for ratification or rejection, a multitude of objections to it were started; many of them suggested by ignorance and selfishness, and among others the apprehended conflicts that might arise between the federal and state governments in the exercise of this right. This objection, if well founded, was felt to be a formidable one by the friends of the constitution; and hence Hamilton devoted to its refutation [584 several numbers, in the series of able and patriotic essays written by him and afterward collected in the *Federalist*. This author, who, as remarked by Mr. Justice Thompson in *Weston v. City of Charleston*, 2 Pet. 476, "has seldom been charged with surrendering any power that can be brought fairly within the letter or spirit of the constitution," in the 32d number uses this strong and emphatic language:

"I am willing here to allow, in its full extent, the justness of the

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reasoning which requires that the individual states should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And, making this concession, I affirm that with the sole exception of duties on imports and exports, they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt, on the part of the national government, to *abridge them in the exercise of it, would be a violent assumption of power unwarranted by any article or clause of its constitution.*"

It may well be assumed that the positive declarations and cogent reasoning of this eminent man did much to allay all apprehension upon this subject by the American people. If it be said the state is only abridged in its exercise where she has herself surrendered the right and is guilty of bad faith in disregarding it, I inquire by what "article or clause" of the constitution of the United States she has conferred upon the general government, or any department of it, the right to judge of the fact of surrender, its validity, and the breach, which must of necessity precede the exercise of control? If this right exists, the federal government is supreme over the subject and the state subordinate; no longer exercising "uncontrollable" authority over a matter purely domestic, with which the other states can have no concern, and vital to her existence. In such matters, within her exclusive authority, she has not committed the keeping of her faith either to this court or the federal government. Nor was there any propriety in her doing 585] so. If the time shall ever come when the people of the states become unmindful of the obligations of honor, justice and good faith, to all classes of their own people, there can be very little hoped from the controlling action of a larger government, founded, sustained and controlled by their sole authority. If corruption ever seizes upon the pillars of the national edifice, its overthrow becomes inevitable.

The clause prohibiting the states from passing laws, "impairing the obligation of contracts," was inserted to suppress an evil which had been extensively felt, of interference between debtor and creditor, and for reasons national in their character. Commerce must of necessity, to a great extent, be general amongst the states, and its instruments, contracts, equally so. To protect the whole, therefore, from the injurious action of any one member of the confederacy, became a matter of obvious propriety, if not necessity. But

we can not bring ourselves to believe that the great sovereign right of taxation by the states was understood, by any considerable number of the convention that framed, or of the states that adopted that instrument, to be included in the well known and clearly defined term, "contracts;" or that any power of control over the exercise of this right was intended to be conferred upon the federal government. And in perfect accordance with this conclusion is the opinion of the court delivered, by Chief Justice Marshall, in *Dartmouth College v. Woodward*, 4 Wheat. 518, where it is said: "That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts *than those which respect property or some object of value*, and confer rights which may be asserted in a court of justice."

It is upon this ground, and this alone, that acts of incorporation have been held, whether correctly or not, to be contracts and irrevocable. They have been considered as grants *of franchises, [586 and, as stated by Mr. Justice Daniel, in *West River Bridge Co. v. Dix*, 6 How. 535, "A franchise is property and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating in his second book, chap. 2, page 20, of the rights of things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment." By referring to the same authority cited by the learned judge, we find a franchise defined to be "a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject," and it is added: "Being therefore derived from the crown, they must arise from the king's grant, or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant." And from the same source we learn that the king alone, in virtue of his royal prerogative, can create corporations. Now, it will hardly be contended that the right of taxation, by the British constitution belonged to the king's prerogatives. Two revolutions in that kingdom, induced to a great extent by an attempted unconstitutional exercise of it, and in which one king paid the forfeit with his life, and another by the loss of his kingdom, have established this great power, even there, to belong to the reserved rights of Englishmen.

Indeed, the boasted omnipotence of a British parliament would be inadequate to do what is here claimed to have been done by the general assembly of republican states; it being an established maxim, that "acts of parliament derogatory from the power of subsequent parliaments, bind not," 1 Bla. Comm. 90. And while it is true that safe parallels can not often be run between that body and the legislative bodies of these states, yet the reasons given for the rule, that parliament is always of equal authority, and that to allow one parliament to derogate from the power of subsequent parliaments would imply a superiority which does not exist, are equally as applicable here as there.

587] *Proceeding upon a similar principle, and one having a very important bearing upon the general merits of this inquiry, the supreme court of the United States in *Young v. Bank of Alexandria*, 4 Cranch, 396, and *Bank of Columbia v. Okely*, 4 Wheat. 235, has held that provisions in acts of incorporation, providing summary remedies for the enforcement of their debts, are "no part of their corporate franchises, and may be repealed or altered at pleasure by the legislative will." And for the reason as stated by the court in the latter case, that "the forms of administering justice, and the duties and powers of courts, as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalienable, so as to bind subsequent legislatures." These cases must be regarded as having settled that sovereign power can not be made a part of the franchises of corporations, and that it can not be parted with by one legislature so as to bind its successors. These principles, carried to their legitimate results, will be found to sustain in their full extent every conclusion to which we have arrived.

But it is claimed that these positions have all been settled adversely to our holding by the supreme court of the United States. While I do not contend that our views have all been sustained by that court by direct decisions, I think a careful examination will show that no case decided by it conflicts with the conclusion to which we have arrived in this.

So far as analogy is to be drawn from the right of eminent domain, and I think it perfect, its decisions must be regarded as having gone very nearly or quite as far as we have gone in the application of like principles to the right of taxation. In *Charles River Bridge v. Warren Bridge*, before cited, it was virtually held that the

legislature of a state might supersede a ferry right, granted to a company, by authorizing a bridge company to build a bridge in the same place; and might, in effect, supersede the bridge by constructing a free bridge in the same line of travel. In the case of the West River Bridge, the direct question was *presented, [588 whether property taken by right of eminent domain, by a company to construct a bridge, as well as the franchises of the company, were subject to be taken by a further exercise of that right by the state; and it was held they were. Mr. Justice Daniel, who delivered the opinion of the court, says; "No state, it is declared, shall pass a law impairing the obligation of contracts, yet with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of promoting the interests and welfare of the community at large. The constitution of the United States, although adopted by the sovereign states of this Union, and proclaimed in its language to be the supreme law for their government, can by no rational interpretation be brought to conflict with this attribute in the states; there is no express delegation of it by the constitution, and it would imply an incredible fatuity in the states to ascribe to them the intention to relinquish the power of self-government and self-preservation." And Mr. Justice McLean remarks: "The only reasonable result, therefore, to which we can come, is, that the power in the state is an independent power, and does not come within the class of cases prohibited by the constitution."

Justice Woodbury, differing in some respects from a majority of the court, but concurring in the decision, said: "I take the liberty to say, then, as the cardinal principle involved in this case, that in my opinion all the property in a state is derived from or protected by its government, and hence is held subject to its wants in taxation, and to certain important uses both in war and peace.

"I concur in the views of the court, that it [the eminent domain] still remains in each state of the Union, in a case like the present, having never been granted to the general government, so far as respects the public highways of a state, and that it extends to the taking for public use, for a road, any property in the states suitable and necessary for it."

*And this decision is in perfect accordance with numerous [589

cases in the state courts. 3 Paige, 45; 23 Pick. 361; 17 Conn. 454; 8 N. H. 398; 10 Id. 371.

It is true, in this case, no attempt to surrender the right of eminent domain had been made by the state further than might be implied in the original grant; but, if these doctrines are correct, they tend to the conclusion that absolute dominion over the whole subject is left with the states, and not an argument can be advanced or a reason given in their support that will not apply with still greater force to the right of taxation.

But two cases, so far as we are advised, have been decided by that court in which the right of taxation by the states has been controlled, upon the ground now asserted. They are *Wilson v. New Jersey*, 7 Cranch, 164, and *Gordon v. Appeal Tax Court*, 3 How. 133. In making this statement, I do not overlook the cases of *McColloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of United States*, 9 Wheat. 738; *Weston v. City of Charleston*, 2 Pet. 449; and *Dobbins v. Comm'rs of Erie County*, 16 Pet. 435. These cases were all decided upon the sole ground that each involved an attempt by a state to tax the means employed by the general government to execute its constitutional powers, and, of course, have no bearing upon the present inquiry.

The New Jersey case arose out of transactions which took place before the revolution between the then colony and a tribe of Indians, by which a tract of land was conveyed to them by the colony with the privilege of exemption from taxation, in consideration of the relinquishment on their part of extensive claims to lands in other parts of the colony. This was held to be a valid contract, within the meaning of the constitution, and the exemption enforced in favor of the grantees of the Indians.

The ground upon which this decision was made, as stated in *Armstrong v. Treasurer of Athens County*, 16 Pet. 290, was that the parties were competent thus to contract, *as no restriction was 590] imposed on the colonial government*, and the *consideration was ample for the exemption." To make that case, where the exemption was made a condition in the sale of land, for a full consideration, by a government without restriction, a precedent for this, where no property was bought or sold, no consideration paid, and the exemption, if made, made by a legislative body sitting under a written constitution with limited powers, would be altogether inadmissible. That this case was not regarded by the bar or bench

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as settling the power of legislative bodies under such constitutions, to surrender the right of taxation, is sufficiently evident from the fact that the question was afterwards several times raised and argued by eminent counsel, and was spoken of, although not decided, with very great caution by the court.

In Gordon's case, for some reason, the question was not raised or discussed either by counsel or the court, although it might be said to be necessarily involved. The power to tax, and the right to limit the power were both admitted by counsel and taken for granted in the consideration of the case. In this case, a very large consideration had been paid for the extension of the franchises and the exemption of the stock from taxation; and the legislature had expressly pledged the faith of the state "not to impose any further tax or bonus on the said banks during the continuance of their charter under this act." If, under these circumstances, this case can be regarded as an authority upon the question of power, and of the right of that court to control the states in the exercise of the right of taxation, it must have proceeded upon the ground suggested by Chief Justice Marshall in the Providence Bank case, "that a consideration sufficiently valuable to induce a partial release of it" did exist. This circumstance, connected with the express pledge given, distinguishes the case so completely from this, as to destroy its value as a controlling authority. Finding no case, therefore, in the federal court decisive of this, we have felt at liberty to consider it upon principle; and we are the better assured in our views from finding them substantially sustained by two of the state courts of high authority. 10 Barr, 449; 10 N. H. 138; 11 Id. 19.

*The considerations above expressed, arising upon the claim [591 made under the act of 1845, also express my opinions upon the same questions presented in the cases of Mechanics' & Traders' Bank v. Henry Debolt; Bank of Toledo v. Bond et al., and Treasurer of Miami County v. Piqua Branch of the State Bank; heard and considered in connection with this case; and for the reasons here given, I fully concur in the several decisions made in these cases.

Decree for complainant.

THURMAN, J., did not sit in this case.

THE MECHANICS' AND TRADERS' BRANCH OF THE STATE BANK OF
OHIO v. HENRY DEBOLT.

A court of chancery will not interfere to prevent a mere trespass.

Where adequate compensation can be had in an action at law, there is no ground to justify the interposition of a court of equity.

Where the injury threatened would be irreparable, or where, from some pecuniary circumstances connected with the parties or the transaction, complete redress can not be had at law, a court of chancery is warranted in assuming jurisdiction.

Chancery will interfere to prevent the invasion of a statutory or corporate right of franchise, conferred upon an individual or corporation, against a party attempting to usurp the right, or exercise the franchise so specially conferred.

But not to prevent a trespass against the property of the individual or corporation which may be compensated in damages, and which does not involve an attempt to exercise the right of franchise against the exclusive grant of the statute or charter.

A distraint by a treasurer against the money and property of an incorporated bank, for taxes assessed against it under the act of March 21, 1851, can not be enjoined in chancery.

If the act be unconstitutional, the treasurer is a trespasser, and is liable in damages, to be ascertained in a court of law; and there is no principle upon which the interposition of an injunction, in such a case, could be maintained.

An ordinary charter is not a contract, within the meaning of the prohibition of the section of the 1st article of the constitution of the United States.

The power of taxation is a part of the legislative sovereignty of the state, and is not the subject of contract, or barter, or sale by the legislature; and if the legislature were to attempt to make such contract, it would be a fraud upon the government, and of necessity void.

592] *CHANCERY. Reserved in the district court of Hamilton county. The case is stated in the opinion of the court.

James and Curwen and Stanbery, for the complainant.

Pugh, attorney general, for the defendant.

CALDWELL, J. The complainant is a branch of the State Bank of Ohio, organized under the act of February 24th, 1845, to incorporate the State Bank of Ohio and other banking companies.

The bank has filed this bill against the treasurer of Hamilton

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county, to enjoin the collection of a tax, under the statute of 1851, taxing banks and bank stock as other property. The bill alleges that this statute is inconsistent with the 60th section of the bank law of 1845, and is therefore void, as being in violation of the charter of the bank. It further alleges that the defendant, as treasurer of the county, is about to proceed to collect said tax by distress, by seizing the personal property and money of the bank, and prays that he may be enjoined, etc.

The first question arising is, whether the case presented is one which warrants the interference of a court of chancery.

The claim set up by the complainants is, that the law under which the treasurer is proceeding to act is unconstitutional and void.

The treasurer, therefore, if he proceeded to act, would be a mere trespasser, and liable personally for the full amount of damage resulting from such action.

Now it is a well settled principle, that a court of chancery will not interfere to prevent a mere trespass, where a complete and adequate remedy can be had by the party injured by an action at law; it is only in cases where, from some peculiar circumstance connected with the parties or with the transaction, that complete redress can not be had at law; that a court of chancery is warranted in assuming jurisdiction.

The rule is laid down in Story's Equity Jurisprudence. The author says: "Courts of equity interfere in cases of trespass; that is to say to prevent irreparable mischiefs, or to suppress multiplicity of suits and oppressive litigation. "For, *if the trespass be [593] fugitive and temporary, and adequate compensation can be had in an action at law, there is no ground to justify the interposition of courts of equity." 2 Story's Eq. Jur. sec. 928. Now, in this case, we do not see that any of the circumstances exist which would authorize the action of a court in chancery. It is true it is alleged in the bill that the treasurer is in embarrassed circumstances, and that he would not be able, probably, to respond in damages. This, however, is explicitly denied in the answer, and there is no proof of the allegations of the bill. The property in which the trespass is apprehended is personalty, without any showing of any difficulty in proving its value, having no peculiar value that could not be arrived at. The mischief, therefore, in legal contemplation, is not extraordinary or irreparable. It is not a case in

which it is necessary that the court should interfere to prevent a multiplicity of suits. The claim is a single and isolated one, made by a corporation for a specific and definite sum, not dependent on or analagous to any other claim presented by any other individual, and involving no oppressive litigation in seeking redress. The court, in the case of *McCoy v. The Corporation of Chillicothe*, 3 Ohio, 370, say: "The separate repetition of trespasses, laying a ground for separate suits between the same parties, is not that description of multiplicity of suits which induces equity to interfere. Where many parties and different rights are involved in the same transaction, all of which can not be legally adjusted without several suits, this state of things is sometimes held a sufficient ground for chancery interference." Indeed, we think the case of *McCoy v. Chillicothe* is directly in point, covering the whole of this case. In that instance, as in this, the party against whom the tax was assessed sought the aid of a court of chancery, on the ground that the law in pursuance of which the tax was levied was unconstitutional and void; the court held that the case did not come within the jurisdiction of chancery, the complainant having an adequate remedy at law. There is but one difference, in fact, between that case and 594] this: that was the *case of an *individual* seeking redress; in this instance it is a *corporation*. This, we suppose, makes no difference in principle; where the injury sought to be relieved against is the same, it matters not whether the aid of the court is invoked by an individual or by a corporation. It is said, however, that a court of chancery will lend its aid where a statutory or corporate right is about to be invaded; and it appears to be thought, that in favor of such rights an exception to the general rule has been made that will apply to this case.

Now, if the collection of this tax is unlawful and would amount to a trespass, it would be a violation of the rights of the corporation, as every trespass is a violation of right, whether attempted under color of law or not; it would, however, be merely an attack on its property without attempting to destroy or meddle with the exercise of the franchise of the bank, so far as the exercise of its powers is concerned. It is not an attempt to prevent the bank from doing business according to the provisions of its charter, and receiving the emoluments arising from such business.

We have been referred to the case of *Osborn v. The Bank of the United States*, 9 Wheat. 738, by counsel for complainant, as in

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point in this case. In that case the supreme court of the United States sustained the chancery jurisdiction, on the ground that the act sought to be enjoined, if performed, would effect a total destruction of the franchise of the bank, so far as Ohio was concerned.

The court say: "The legislature had passed a law for the avowed purpose of expelling the bank from the state, and had made it the duty of the auditor to execute it as a ministerial officer. He had declared that he would perform this duty. The law, if executed, would unquestionably effect its object, and would deprive the bank of its chartered privileges, so far as they were to be exercised in that state. It must expel the bank from the state; and this, we think, a conclusion which the court might rightfully draw from the law itself." The court further say: "The application to the court was to interpose its writ of injunction to protect the bank, not *from the casual trespass of an individual who might not [595 perform the act he threatened, but from the total destruction of its franchise, of its chartered privileges so far as respected Ohio."

And on this finding that the act about to be perpetrated would destroy the franchise of the bank, the court based its decision. The amount of the tax was \$100,000, which they find was intended to drive the bank out of the state, and must, if not prevented from being carried into effect, produce that result. It can not be contended that any such state of fact exists in this instance. The law under which the tax is levied requires that the property of the bank should be taxed, as the property of individuals is taxed—nothing destructive or oppressive in its character.

The cases to which we have been referred by the counsel in argument to sustain the chancery jurisdiction, all, as we think, differ materially in principle from the present. One of these cases, that of the Croton Turnpike Company v. Ryder et al., 1 Johns. 610, will illustrate the distinction. In that instance the defendants had erected a shunpike, by which the travel was enabled to pass around the toll gate of the corporation, thus depriving it of its business, and this was the whole ground of complaint. There was no forcible injury to the property of the company apprehended; no money or other property to which it could lay claim was to be taken possession of or appropriated; the injury, from its very nature, was impossible of computation, and, without the aid of a court of chancery, redress could only be sought by vexatious litigation—there was no adequate remedy at law. The court, in laying down the

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principle, say: "The equity jurisdiction in such a case is extremely benign and salutary. Without it, the party would be exposed to constant and ruinous litigation, as well as to have his rights excessively impaired by frauds and evasion."

The case of *Livingston & Fulton v. Vaningen et al.*, 9 Johns. 507, on the authority of which *The Croton Turnpike Company v. 596* *Ryder* was decided, was one in all respects *similar. The complainants had a monopoly in the steam navigation of the Hudson river, the defendants had put steamboats on the river, that were depriving them of the business and emoluments intended to be secured by the statutory privilege, rendering it of no effect; and the injury, as in the other instance, would have been impossible of definite calculation.

We think no distinction exists in reason between an injury done to property in the hands of a natural person, and the same or a similar injury done to property belonging to an artificial person. It is only on the ground that an adequate and complete remedy can not be had at law, that a court of chancery is warranted in interfering in either case. If a statutory right is invaded, so that a body corporate is likely to lose such right, or be prevented from the exercise of it, chancery will interfere. If irreparable mischief is about to be done to the rights of an individual, it will also interfere; but where it is a simple trespass to personal property, as in the present instance, it is not warranted in interfering, let the property belong to whom it may. Even for infringements of patents for invention and copyrights chancery only claims jurisdiction on the ground that, in such cases, it is necessary to prevent multiplicity of suits and vexatious litigation.

It has been contended, however, in argument, that if the bank is required to pay this tax, it will diminish its capacity to do business, and, in that way, deprive it to that extent of the benefit of its franchise. This consequence we think too remote to call forth the exercise of the extraordinary powers of a court of chancery. It no more diminishes the capacity of the bank to do business, than it would the capacity of a natural person to carry on and enjoy his business; and when the law has afforded its redress, by an action of trespass, in legal contemplation, the capacity of the bank is restored.

Believing that there is no state of fact presented which authorizes the action of a court of chancery, the bill must be dismissed.

*This disposes of the case ; but there were some questions [597 raised in argument which were supposed to be involved in the controversy, that I can not leave without a few remarks. It is contended that this bank, under the 60th section of the law of 1845, under which it claims to exist, is exempted from taxation, except as therein provided. That section reads thus:

"Each company organized under this act, or accepting thereof and complying with its provisions, shall, semi-annually, on the days designated in the fifty-ninth section for declaring dividends, set off to the state six per centum on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding ; which sum or amount so set off shall be in lieu of all taxes to which such company or the stockholders thereof, on account of stock owned therein, would otherwise be liable."

Now, it is said that this provision, being contained in a charter, amounts to a contract on the part of the legislature, that no greater tax than therein enumerated should ever be levied on the bank, and that the attempt of the legislature to pass a law to tax the property of the bank as the other property of the state is taxed, comes within the prohibition of the 10th section of the 1st article of the Constitution of the United States, preventing the states from passing any law impairing the obligation of contracts. Is this charter, then, a contract on the part of the legislature, or is it a law? The legislative power of the state is vested in the general assembly. This body is elected by the people, whose representatives they are ; their business is to pass laws, prescribe rules of action ; their powers are limited to the passage of laws, and to the fixing of rules necessary for their government in the performance of their legislative duties, except in those cases where, by express provision, duties other than legislative are conferred. The general assembly have not general powers over the interests of community, either individually or collectively, except in the exercise of legislative powers. They have no right to create *institutions [598 and fix rules for their government, except as legislators. They are clothed for the time being with the sovereignty of the state, to be exercised by them without any power to barter or sell it. They can not abridge the legislative power of the state so that their successors will not possess the same powers that they possessed. The legislative power to repeal a law is co-extensive with the power to enact it. If the legislature were to attempt to abridge the rights

of a future legislature to repeal or modify their acts, such attempted restriction would be void.

If they attempted to restrict future legislation under the name of contract it would be equally void; it would be a bartering away the sovereignty of the state. But no legislature has ever attempted to contra-distinguish their proceedings in the passage of acts of incorporation from the passage of other laws. They all commence in the form of a law—"Be it enacted, etc."—all the forms of legislation are observed in their passage through the two houses; they are all evidenced as laws—called laws—published in the code of laws without any distinction from other laws. In short, treated by all parties, interested and disinterested, as laws. If laws, then they must be subject to repeal or alteration, else the legislative sovereignty could be exhausted, destroyed by the legislature; the people could still elect their representatives, but their powers of legislation would depend on what their predecessors had done.

Does a charter contain the requisites of a valid contract? One requisite is that mutuality must exist; both parties must be bound to performance, or neither is bound. Are the corporators bound in an ordinary charter to do anything? They are not bound to do anything. They need not commence acting at all; and, having commenced, they may at any time cease to act. It is true that, whilst acting, they are bound to act in accordance with the terms of the law creating the corporation, just as all other parties are bound to an observance of the laws in their actions in whatever capacity; but they are at no time bound to continue to do any thing. What recovery could be had by the other party (the state) for their failure to continue the business provided for in the charter? What would be the form of the action? What would be the measure of damages? And how should they be assessed? In order to make a binding contract, there must be a good or a valuable consideration. According to our law, all contracts can be avoided in whatever form they may exist for the want of this requisite. Yet whoever thought of avoiding a charter on the ground that the contract under which it existed was void for want of consideration? Although in many instances it would be the easiest possible thing to prove that no consideration either good or valuable existed on the part of the corporation. Whoever thought of impeaching a charter on the ground of misrepresentation on the part of the corporators in obtaining it, although such state of fact has frequently

been said to exist? Who, of the thousands of persons that have approached the legislature of the state for the purpose of obtaining charters, has thought or felt that he was striking a bargain with the legislature, by which the legislature was to agree that the sovereignty of government over a subject, by both parties admitted to be within its control, should be suspended? What citizen ever had the boldness to express himself so corruptly, so treasonably, in a manner so degrading to the dignity of his state? Yet this would be only proper language for him to use, if the doctrine that a charter is a contract over which the legislature ceased to have control was true. What general assembly or what compiler ever thought of dividing the published legislative proceedings, so as to discriminate between the bargains or contracts, and the ordinary laws? Yet, if that distinction exists, there would be great value and propriety in making the discrimination. Although the doctrine has been some time in vogue, and has been pressed with all the perseverance that selfishness and avarice could dictate; yet we think that a large part of the published proceedings of a legislative body, headed bargains or contracts, would strike the mind of the true man as startling. *And although it has been so declared by [600 high authority, neither the natural or legal mind has ever been able to realize the idea that a charter is a contract.

It is a law of the legislature, and nothing else. But supposing that the legislature considered it as a contract, and that it was so regarded by the corporators, and that the legislature did agree that the charter created should not be under the future control of the legislature. The contract, so far as it restricted future legislative control, must be void for the reason above stated. The legislature can not dispose by contract of any part of the sovereignty of the state; they can not contract away any branch or subject of legislation. If the legislature make a contract, it is not in their own right, it is as the agents or representatives of the people. If an agent transcends the power conferred on him, any contract which he may make will not be binding on his principal, so far as it is made without authority. Take the charter under consideration as an illustration of the effect of one legislature attempting to control the action of a subsequent one by bartering away some subject of legislation. Now it is said that the general power of taxation over the property of this bank is gone, that a law taxing the property of this bank as the property of other persons is void, because

it is said that a previous legislature has contracted that the bank should not be taxed in this way, but should only be taxed by a per centum on its profits. The power of taxation is one of the sovereign powers of the state, it can only be exercised through the legislature, it is a power that has constantly to be resorted to, can never be dispensed with, it is inseparable from government, without which, government must cease to exist. It must be proportioned to the wants of the state, and must be made commensurate with those wants. From its very nature it must be constantly varying in its objects and in its amounts. Now no person will doubt but that the legislature originally had the power to tax all the property of citizens within the state, and to make that tax equal on all 601] without respect to persons; they had also the same power *over the property of corporations within the state, all the property owned in the state, no matter by whom, being subject to this power. By the law of 1851, the state has attempted to exercise this original power by taxing the property of this bank as other property is taxed, and this is considered a grievance, because it is said that the legislature of 1845 had contracted that the property of the bank should not be thus taxed. If this be true, then the legislature of 1845 have bargained away a portion of the sovereignty of the state, have sold out a part of the taxing power. The legislature of the state has no longer the capacity of doing right, doing equal justice, requiring the taxes to be equal; one very important prerogative of legislation is gone. Had the legislature of 1845 any right to make such a bargain? If they had attempted it, would it not have been treason? treason of the blackest kind? Could any citizen of this country, who has the heart or spirit of a freeman, contemplate such an idea without a shudder? Because if the legislature can bargain away the taxing power of the state in one instance they can in another; if they can bargain it away to companies they can to individuals; if they can sell out the sovereignty of the state in part they can in whole, and thus bring the government to an end.

In 1851 the people of this state formed a new constitution; one of its provisions requires that the property of the state shall be equally taxed, as well that which belongs to corporations, such as this, as the property of individuals. That the people of this state once could have formed such a constitution and carried it into effect, no one will doubt. But if the doctrine here contended for be true, the people of this state can not carry their constitution

into effect; the sovereignty of the state has been in fact disposed of, sold out.

It is said, however, that the authority of the legislature over the taxing power may be disposed of for a limited time. It can no more be disposed of for a limited time than it can be parted with forever; being one of the inherent sovereign powers of the state, it is in no way the subject of barter or *sale. Nor would it [602 matter what bonus might be paid by a party obtaining such a contract; the sovereignty of the state can not be computed in dollars and cents; it is above price. The sovereignty of government is an object held dear by all people; it should be especially so by a free people in whom it is vested. In the history of the world we have many instances of humanity exhibiting itself in a truly sublime attitude in defense of its sovereignty; few nations have been so degraded that they would give up this inestimable boon without a struggle; very few have been willing to bargain it away; and it is truly humiliating that any portion of the people of this country should feel that the sovereignty of a state was the proper subject of barter and sale.

Could the framers of the constitution of the United States have ever meant to include under the term contracts, these legislative enactments? By the term contract we suppose they meant what at that time the term was understood to express. It was long after the formation of that instrument before such enactments were supposed to be contracts. No legal writer had treated of them as contracts, nor had they in any way been spoken of as such; the decisions, which first declared so, gave to the world a new term, as well as a new idea, for the thing. No extraordinary latitude should be given to the use of this provision in the constitution of the United States; no general power is given to the general government over the affairs of the states; the general government was not made the supervisor of the state governments to determine when they were acting in good faith within the sphere of state sovereignty; the determination of this question was thought to be better left with the states themselves, and was so left. It is sometimes urged that it would be a very dangerous power for the legislature to exercise, in any way to assume control over chartered institutions. This idea appears to me to be entirely visionary. Government by virtue of its sovereignty claims the right to take any citizen's property from him when it is needed for public uses; although

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603] he may have paid his money to the government *itself and received a deed guarantying it to him and his heirs forever, by a contract of the most solemn kind, yet such contract is made subservient to the sovereignty of government; and why a person who receives a charter conferring on him some right, which he was not entitled to as a citizen—a privilege not enjoyed by his fellow-citizens generally—should hold it beyond the control of government, or why government should regard it as more sacred than the natural and common rights of the citizen, I can not see.

Believing, as I do, this doctrine—that a charter is a contract within the meaning of the constitution of the United States, that therefore the legislature ceases to have control over it, and that in this way the taxing powers and other powers of legislation may be surrendered for the benefit of corporations—to be subversive of the rights of the people, at war with the principles of our government, and fraught with mischief incalculable, I feel impelled, as a lover of the free institutions of my country, and its principles of equality, on all proper occasions, to enter my protest against it. The bill will be dismissed.

Bill dismissed.

THURMAN, J., did not sit in this case.

JACOB KNOUP, TREASURER OF MIAMI COUNTY v. THE PIQUA
BRANCH OF THE STATE BANK OF OHIO.

Where a statutory remedy for a right created by that statute is repealed, but the repealing statute provides a substantially similar remedy, the right may be prosecuted under the repealing statute.

An appeal may be taken from the common pleas to the district court under the "Act to regulate appeals to the district court," from any final judgment or decree rendered in a civil cause, in which the court of common pleas had original jurisdiction, whether the action is given by statute or existed at common law.

604] *A tax regularly assessed, under the act of March 21, 1851, "to tax banks and bank and other stocks the same as other property," is not remitted by the repealing clause of the act of April 18, 1852.

The legislature will not be considered as having undertaken to surrender the taxing power of the state in the absence of express words to that effect.

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The act of March 21, 1851, impairs no right of any banking company or ganized under the act of February 24, 1845, and is a valid and constitutional law.

Obiter.—That every organization clothed with authority to make currency is a public institution, performing a public function, exercising public power, and always subject to public control.

RESERVED in Miami county.

The Piqua Branch of the State Bank of Ohio, having refused to pay the taxes assessed against it, under the act of March 21, 1851, "to tax banks and bank and other stocks the same as other property is now taxable by the laws of this state" (49 Ohio L. 56), the plaintiff, the treasurer of Miami county, being unable to collect the same, made application for a rule against the bank to show cause why it should not pay said taxes.

The act of March 21, 1851, required the taxes assessed under it "to be collected and paid over in the same manner that taxes on other personal property are required by law to be collected and paid over."

The act providing the remedy in such cases at the time the taxes became payable and delinquent, is as follows: "If the county treasurer shall be unable to collect the taxes which have been or hereafter shall be assessed upon any person or on any executor, administrator, guardian, receiver, accounting officer, agent or factor, such treasurer shall apply to the court of common pleas in his county, and the court shall cause a notice to be served upon such person, executor, administrator, guardian, receiver, accounting officer, agent or factor, requiring him forthwith to show cause why he should not pay such taxes; and if he shall fail to show a sufficient cause, a rule shall be entered against him for the payment of such taxes and the cost of such proceeding, *which rule shall [605 have the same force and effect as a judgment at law, and be enforced by attachment or execution, or such process as may be directed by the court." 49 Ohio L. 75, sec. 44.

The act of 13th April, 1852, under which the proceeding was commenced, and which, it is claimed, repealed the preceding acts, contains the following provision:

"If the county treasurer shall be unable to collect, by distress or otherwise, the taxes which have been, or hereafter shall be assessed upon any person or corporation, or on any executor, administrator, guardian, receiver, accounting officer, agent or factor, such treas-

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urer shall apply to the clerk of the court of common pleas in his county, at any time after his annual settlement with the county auditor, and said clerk shall cause a notice to be served upon such person, corporation, etc., requiring him forthwith to show cause why he should not pay such taxes; and if he shall fail to show sufficient cause, said court, at the term to which said notice is returnable, shall enter a rule against him for the payment of such taxes and the costs of such proceeding, which rule shall have the same force and effect as a judgment at law, and be enforced by attachment or execution, or such process as may be directed by the court. 50 Ohio L. 157, sec. 51.

The court of common pleas of Miami county refused to enter the rule applied for, and gave judgment against the plaintiff for costs, from which judgment he appealed to the district court.

The defendant moved in the district court to dismiss the appeal, and the cause was reserved for decision by the supreme court.

Pugh, attorney-general, for plaintiff.

Hart and *Stanbery*, for defendant.

CORWIN, J. This is a petition filed by the treasurer of Miami county against the Piqua Branch of the State Bank of Ohio, located 606] in that county, alleging the assessment of *certain taxes against the bank, under the law of March 21, 1851, which were due and unpaid, and which the bank refused to pay, and also alleging the ineffectual efforts of the treasurer to collect the taxes, and asking a rule on the bank to show cause why an order should not be had requiring it to pay such taxes. To this petition the bank answered, and the principal matter of controversy between the parties is found in the reason assigned by the bank, against the rule that it was organized and doing business under the provisions of the act of February 24, 1845, which prescribed a different rule and rate of taxation from that provided for in the law under which this tax was assessed; and that the bank had fully paid the auditor of state all the taxes for which it was liable under the act of February 24, 1845.

Upon the hearing in the court in common pleas, the rule was discharged and judgment rendered against the plaintiff for costs; from which judgment an appeal was taken to the district court, and by that court the cause was reserved for decision here.

The first question for consideration arises upon the motion of

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defendant to dismiss the appeal; in support of which motion it is claimed:

1. That the law authorizing the remedy here resorted to is repealed.

2. That the act giving this remedy made no provision for an appeal from the court of common pleas.

In *Lessee of Mitchell v. Eyster*, 7 Ohio, 257, the court say: "Where there is no express indication of legislative intention, it is not to be assumed that it was intended by any new enactment to arrest the regular prosecution of process, essentially remedial, and take away the right acquired under it. Possibly it is competent for the legislative power to do this; but it is only to be imputed to them when the language they have employed admits of no other interpretation." And in the case of *Henry Debolt, Treasurer, etc. v. The Ohio Life Ins. & Tr. Co.* decided at the present term of this court, the rule laid down in *Mitchell v. Eyster* is *expressly [607 recognized and approved. It may be considered as settled that where a statutory remedy for a right created by that statute is repealed, but the repealing statute provides a substantially similar remedy, the right may be prosecuted under the repealing statute. And this disposes of the first objection to the proceeding.

2. As to the right of appeal. It is true that the act giving this remedy makes no provision for appeal from the court of common pleas; but it will be observed that this appeal was perfected after the passage of the act of March 23, 1852, "regulating appeals to the district court," which fully provides for an appeal to the district court from a final judgment or decree of the court of common pleas in any civil cause of which it had original jurisdiction. If, then, this be a civil cause, of which the court of common pleas had original jurisdiction, and in which the final judgment of said court has been rendered, the right of appeal upon compliance with the terms of the statute is complete. And this is so as to all civil causes, whether the action is given by statute or existed at common law.

This brings us to consider the important question made in the case, whether a banking company, organized under the act of February 24, 1845, "to incorporate the State Bank of Ohio and other banking companies," is exempted from any other mode or rate of taxation than that provided for in said act? The unanimous opinion of this court upon the same question has been fully expressed by my brethren, at the present term, in the cases of *The Mechanics'*

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and Traders' Branch of the State Bank of Ohio, and the Ohio Life Ins. & Tr. Co., in which it was held that the 60th section of the act of February 24, 1845, contains no pledge, on the part of the state, not to alter or change the mode or amount of taxation therein specified; but that the taxing power of the legislature over the property of companies formed under that act is the same as over the property of individuals; and that the act of 1851 does not impair any right secured to them by the act of 1845.

608] *It is wholly unnecessary for me to indulge in any repetition of, or enlargement upon, the views of the court as expressed in the cases referred to; and, in the decision of this cause, I shall content myself by adopting, as I do very fully, both the conclusions arrived at, and the reasons by which they were maintained.

But, notwithstanding the points thus decided, receiving the approbation of the whole court, are sufficient to dispose of this controversy, I will not forego the opportunity presented upon a question involving the theory of our institutions, and the existence of free government itself, of declaring, upon my own responsibility, what I conceive to be due to truth and correct principle, that an incorporation for banking purposes is not a contract, vesting a private right in the persons designated for the accomplishment of those purposes to carry on the business of banking independently of the sovereignty by which they are appointed. And, instead of being restrained by prevalent opinions of an opposite character, I feel it the more due to myself and to my position so to declare; because an ill-considered and insupportable *dictum* of one of the judges of the supreme court of the United States, in the Dartmouth College case, having been eagerly seized by the cupidity of the age, and tolerated by the indifference of the disinterested portion of the legal profession, is now urged upon us as settled law, notwithstanding its conflict with every idea of popular sovereignty, its disregard of the purposes and objects for which a banking institution is created, its hostility to the legal definition of a contract, and its utter want of support in reason or authority. For it must be remembered that, for the first time in the history of mankind, the *dictum* was announced by a single judge in the year 1819, in a case involving no such question, that a bank charter was a private contract. And, although in some of the subsequent reported cases some of the judges of that court have manifested an inclination to adopt that doctrine, yet no court has in fact so decided; and it

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must remain for some judicial decision, as yet unborn, to establish, that when *a state or government, in the exercise of one of its [609 sovereign functions and duties, to regulate the currency, appoints an agency, corporate or natural, to aid in the discharge of that duty, a private contract is thereby created with such agent, by which so much of the public sovereignty is parted with, and the agent acquires the irrevocable right to discharge that function, independently of the control and regulation of the power creating it.

To such a doctrine, I not only interpose my unqualified dissent, but maintain that a banking institution is a *public* institution, appointed for public purposes—never legitimately created for private purposes—its creation proceeding solely upon the idea of public necessity or public convenience, and that, being appointed by the public, solely for public uses, all its operations are subject to the control of that public, who may, from time to time, as the public good may require, enlarge, restrain, limit, modify its powers and duties, and, at pleasure, dispense with its benefits. The agency, during its continuance, is equally independent within its sphere, and upon a modification of its terms unsuited to its pleasure, the agency itself may be renounced and surrendered. So the rights of the agent to the profits and emoluments of the agency, as they may, from time to time, be prescribed, will be sacredly regarded and enforced by the courts of justice; but, like every other agency, it is revocable at the will of the principal.

In *Phillips v. Bury*, 2 Term, 352, Lord Holt drew a distinction between such corporations aggregate as are for public government, and such as are for private charity. The former, he said, "being for public advantage, are to be governed according to the laws of the land," but the latter, "private and particular corporations of charity, are subject to the private government of those who erect them."

And in the first book of Blackstone's Commentaries, page 475, we have a summary of the rights, capacities, and incapacities of corporations at common law. The five incidents to every corporation aggregate are thus defined: 1. To have *succession. 2. [610 To sue and be sued, plead and be impleaded, grant or receive by a corporate name, and to act as natural persons may act. 3. To purchase lands and hold them. 4. To have a common seal. 5. To make by-laws or private statutes for the better government of the

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corporate business. These five incidents, therefore, make the corporation, and *when made*, it is, like a natural person, capable of exercising such trusts and performing such duties as the law may designate.

Our constitution of November 29, 1802, provided for the establishment of corporations aggregate, and specified the powers, rights, and capacities to which they should be entitled. Section twenty-seventh of Article eighth is in these words: "That every association of persons, when regularly formed, within this state, and having given themselves a name, may on application to the legislature, be entitled to receive letters of incorporation, to enable them to hold estates, real and personal, for the support of their schools, academies, colleges, universities, and for other purposes."

I do not propose now to discuss the question, whether it is within the competency of the legislature to grant any charter, in the absence of an express constitutional provision conferring such legislative power, nor am I disposed to controvert, that under the section of the constitution above quoted, *some franchises* may be delegated to a private corporation, or to an individual; but such delegations were never designed to confer, nor do they confer, any right of *property* in the corporation or individual; they are made from public considerations alone, and the corporation or individual becomes only a *trustee* for the public benefit.

In *McCulloch v. The State of Maryland*, 4 Wheat. 421, it was urged by counsel, that congress could create no private corporation without the limits of the District of Columbia, because the federal government might thereby engross the powers of the state governments, and that therefore the act to incorporate the Bank of the United States was unconstitutional. But the supreme court answered, that the bank *was* a mere agency or instrument of the federal government, created for the public convenience, and not created for the profit or advantage of the stockholders. Mr. Chief Justice Marshall said: "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power which can not be implied as incidental to other powers, or used as a means of executing them. It is never *the end* for which other powers are exercised, but a *means* by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created

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to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else."

In *Osborne v. The Bank of the U. S.*, 9 Wheat. 738, the late Charles Hammond, of counsel for the appellants, argued thus: "The question whether the Bank of the United States as now constituted is exempt by the constitution of the Union from the taxing power of the state, depends upon the nature and character of the institution. If it stands upon the same foundation with the mint and the post office; if its business can justly be assimilated to the process and proceedings of the federal courts, we admit, without hesitation that it is entitled to the exemption which it claims. The states can not tax the offices, establishments, and operations of the national government. It is not the argument of the opinion in *McCulloch v. Maryland*, but the premises upon which that argument is founded, that we ask the court now to examine and reconsider. Banking is in its nature a private trade, and is a business in which individuals may at all times engage, unless the municipal law forbid it. Where this is not the case, it is competent for individuals to *contract together and create capital to be [612 employed in lending money, and buying and selling coins, bullion, promissory notes, and bills of exchange. No law is necessary to authorize a contract between individuals for concentrating capital to be thus employed: nor does the business itself depend upon any special laws for its creation or existence. An association thus formed may take to themselves a name, and may establish rules and regulations to govern them in the transaction of their business, and to determine their relative rights and duties among themselves. The general law not only recognizes the obligation of this contract between the parties; it recognizes also the capacity of the association thus formed to make contracts in the name they have assumed, and the rights of the individuals as joint partners, or one party to enforce their contracts. The whole is a private concern, the capital is private property; the business a private and individual trade, the convenience and profit of private men the end and object.

"Such is the true character of a bank constituted by individual

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stockholders. Its rights and privileges, its liabilities and disabilities are all the rights, privileges, liabilities, and disabilities of private persons. . . . If, then, a banking association be formed, the capital collected, the mode of transacting the business be settled, and the whole concern regulated and established before any application be made for a charter, it is clear that the mere fact of enacting a law, creating the association a corporation, could not change its character. It was a company of individuals conducting a private trade before it was incorporated, and it retained the same character afterwards. The charter was granted to give facility to the individuals in the management of their private affairs; not that in virtue of that charter they might share in the civil government of the country."

Mr. Chief Justice Marshall did not evade such an argument, but met it with this answer: "The foundation of the argument in favor of the right of a state to tax the bank, is laid in the sup-613] posed character of the institution. The *argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object. If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its being employed by the government, in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that congress could create such a corporation."

I do not wish to be understood that we approve the conclusion of *McCulloch v. The State of Maryland*, nor that of *Osborne v.*

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The Bank of the U. S., but we can adopt the correct legal propositions which were misapplied to those two cases. We are certain, therefore, that a corporation or an individual to whom a franchise is delegated does not hold it as property, nor as matter of private advantage. For although profit may *result* to the corporators or the individual, that is but incidental to the purpose for which the franchise was delegated.

Let us understand clearly what is a franchise. The right to be a corporation has sometimes been called a franchise, but that is a misapplication of terms. The right to *create* a corporation assuredly is a franchise; so is the right to create an office, or to [614 coin money, or to appropriate private property, or, in England, to take royal fish, to work mines of gold and silver, to take waifs, wrecks, estrays, and treasure trove, to hold courts baron or courts leet, to keep warrens, forests, parks, and chases, and many privileges of the like description. A franchise is a right belonging to the government, as a sovereign, yet committed, *in trust*, to some officer, corporation or individual. On page 279 of the third volume of Cruise's Digest, it is said: "A franchise is a royal privilege or branch of the King's prerogative, subsisting on a subject by a grant from the crown." It must needs be a sovereign power, or something which no subject or citizen can, of right, use. In England, as is well known, there were certain fish, as whale or sturgeon, to which, when thrown ashore or caught near the coast, the king is entitled. Mines of gold and silver, also, were the king's property, and part of his revenue. All the game in the kingdom belonged originally to him, as did all waifs, wrecks, estrays, treasure trove, deodands, etc. None but the king, at first, could have a forest, a chase, a warren, or a park. 1 Black. Com. chap. 8th; 3 Cruise's Digest, title 28, chap. 1. In England, therefore, all such rights, when delegated to a subject, are franchises. But, in this state, any man may take what kind of fish soever he can catch in the public waters, and any man can work, on his own lands, what mines soever may be there. Any man, too, may have a forest, a warren, a chase, or a park, if he wishes, upon his own land; and therefore we have no such franchises. The powers enumerated in the twenty-seventh section of the eighth article of the constitution of 1802 are all of them such as private citizens enjoy of right, and therefore are not franchises. A statutory privilege is not necessarily a franchise; it may or may not be, according to the char-

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acter of the privilege. A monopoly is not a franchise—it is a thing disfavored in law, an abuse, a public nuisance.

It is plain that many things are the subjects of a franchise in England which are not such in this country. The distinction 615] *will appear by a single example. Any citizen may construct a railroad upon his own land, but no citizen can construct a railroad upon the land of another, without that other's consent, unless authorized to do so by law. The right to construct a road over the lands of private citizens, without their consent, is a sovereign right; it is the right, so called, of eminent domain. Whenever that right is delegated to a corporation or an individual, by an act of the general assembly, the corporation or individual has a *franchise* of eminent domain. In England, also, a franchise may become the *property* of a corporation or an individual. For the king of England is himself a sovereign; from him, mediately or immediately, are derived all the titles to land, goods or chattels, as well as all private or personal rights. 4 Inst. 363. He can give titles of nobility and honor, can prefer one man to another, can exempt one man or class of men from the burdens of government. "At the common law," says Lord Coke, "the king, by his prerogative royal, might give such honor, reputation, or placing to his counselors, and others, his subjects, as should be seeming to his wisdom." 4 Inst. 361. The king of England has such power both over the persons and property of his subjects, because he is the source of all honors, offices, rights, titles, and privileges. 1 Bla. Com. 271, 272, 273.

But, in Ohio, the general assembly can confer no title of nobility, no honor, no irrevocable privilege, which will exempt its possessor from the equal and uniform operation of our laws. It can not even confer an emolument, privilege, or honor, in hereditary succession. Our government is founded upon that sublime truth, acknowledged in both our present and old constitutions, as well as in the Declaration of Independence, that all men are created free and equal, and that every exemption, immunity or privilege, is an invasion of the primordial estate and natural rights of other citizens. Whenever, therefore, a franchise is conferred upon a corporation or an individual, nothing but *the public good* is to be considered; the private 616] advantage which may result to the *corporation or individual is but incidental to the chief object, and can not ripen into a right of property.

The best illustration of this, perhaps, will appear by comparing

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the nature of an office in England and an office in America. An office, like a franchise, is a royal gift: it is considered property in England. Some offices are estates in fee simple or fee tail; some, estates for life; and some only estates at will. Cruise's Digest, vol. 3, title 25. There are some offices, also, which are said to be estates for a term of years, or for one year. And ministerial offices may be granted in reversion, or to commence at a future period. Some offices are even assignable by deed. But, in America, a public officer is only a public agent or trustee, and has no proprietorship or right of property in his office. It is true that in *The State v. McCollister*, 11 Ohio, 50, Judge Hitchcock said, that an officer had "a vested right" in his office, but that *dictum* is opposed to many and well considered authorities. *Butler v. The State of Pennsylvania*, 10 How. 402. *The State v. Dens*, Charleton, 397. *The Commonwealth v. Bacon*, 6 Serg. & R. 322. *The Commonwealth v. Mawe*, 5 Watts & S. 418. *The Commonwealth v. Clark*, 7 Watts & S. 127. *Barker v. The City of Pittsburg*, 4 Penn. St. 51.

It is true, that an officer elected by the legislature, or the people, can not be expelled from his office, arbitrarily, by a resolution or act, because the constitution prescribes an impeachment, or other mode of trial for such cases; but if the office be created by the legislature, it may, in the absence of express constitutional restriction, be abolished or suspended; and yet the officer can not claim compensation for the loss of his office. He has no property or individual right in it. He is but a trustee for the public; and whenever the public interest requires that the office should be abolished, or the duties of the office become unnecessary, the incumbent can not object to the abolition of the office.

That franchises are conferred for the public good alone is evident from another consideration. The fourth section *of the [617 eighth article of the constitution of 1802 declared that "private property ought, and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation, in money, be made to the owners." The legislature can not authorize private property to be taken for private use, with, or without compensation. This would be clearly unconstitutional. *McArthur v. Kelly*, 5 Ohio, 149, 150. *Taylor v. Porter*, 4 Hill (N. Y.) 147, 148.

If, therefore, a railroad company be a private corporation, how can the legislature justify itself in conferring the franchise of eminent domain—in authorizing the appropriation, *in invitum*, of pri-

vate property, for merely *private* purposes? This question was considered and discussed by Chancellor Walworth in *Beekman v. The Saratoga & Schenectady R. R. Co.*, 3 Paige, 73, 74, when he said: "The right of eminent domain does not, however, imply a right in the sovereign power to take the property of one citizen, and transfer it to another even for a full compensation, where the public interest will be in no way promoted in the transfer. . . . Upon the principle of public benefit, not only the agents of the government, but also individuals and corporate bodies have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals; of erecting and sustaining wharves and basins, of establishing ferries, of draining swamps and marshes, and of bringing water to cities and villages. In all such cases, the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies or individual enterprise."

In the case of *Bloodgood v. The Mohawk & Hudson R. R. Co.*, 18 Wend. 13, the chancellor reiterated and enforced the same propositions. And in *Cottrill v. Myrick*, 3 Fairfield, 222, the supreme court of Maine say: "If public purposes and uses were to be promoted, as they undoubtedly were in the case before us, it 618] was no objection to the power *of appropriation by the legislature, that it contributed *also* to the emolument or advantage of individuals or corporations."

I am fully cognizant of what was said by the judges of the supreme court of the United States in *Dartmouth College v. Woodward*, 4 Wheat. 518. The chief justice said that Dartmouth College was a private corporation, and that "the circumstances of that case constituted a contract." But a college is an eleemosynary corporation, and is expressly distinguished by Lord Holt from corporations which are "for *public* advantage." The chief justice did not, however, even say that the charters of private corporations were contracts; Mr. Justice Story did say so, and perhaps the language of Mr. Justice Washington would extend that far; but those two judges delivered opinions for themselves and not for the court. I might, if it were necessary, draw a clear distinction between the charter granted to Dartmouth College by the king of England, and

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a charter granted by our legislature ; but that would lead me too far from my present purpose.

Mr. Justice Story said also, that a bank was a private corporation, and for the reason that its stock is owned by private persons. But, as we have seen, where that very reason was urged at the same term to show that congress could not create a bank without the limits of the District of Columbia, the supreme court, speaking by the chief justice, said that the nature of the business, whether public or private did *not* determine the character of the corporations. *McCulloch v. The State of Maryland*, 4 Wheat. 411. And even the opinion of the court delivered by the chief justice in *Dartmouth College v. Woodward*, 4 Wheat. 638, is opposed to this *dictum* of Mr. Justice Story. "The character of civil institutions," says the chief justice, "does *not* grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being instruments of government created *for its purposes. The same in- [619] stitutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controlled by the legislature. The incorporating act neither gives nor prevents this control." And when the same reason was again urged, long afterward, to show that the Bank of the United States could be taxed by the state governments, the chief justice, speaking for the court, said: "The bank is not considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation, created for public and national purposes. . . . It was not created for its own sake, or for private purposes." Yet much the larger number of the shares of the stock of the Bank of the United States were owned by private persons.

It is plain, therefore, that even if banking were a private business, a bank would not, necessarily, be a private corporation. But banking is no more a private business, certainly, than making a railroad or a turnpike, and yet, when they are made, in virtue of a franchise of eminent domain, the corporations are public corporations. For how, otherwise, I repeat, could the legislature authorize them to appropriate private property, without the consent of the owners? Is it true, however, that banking is a *private* business? I do not mean merely the purchase and sale of bullion and bills of exchange, the discount of promissory notes and other obligations,

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and the receiving of money on deposit. Those are things which any citizen may do; they require no permission from government, nor is the right to transact them a franchise. I use the term "banking" in the sense of our statutes—the business of issuing promissory notes, bills, or certificates, to circulate as money. That is what no citizen can, *of right*, do. He may give his promissory note, bill of exchange, check, or certificate of deposit, to any person who is willing to take it; and it may even pass from hand to hand, upon his reputation for ability and readiness to discharge his obligations. But a bank bill is something different; it circulates 620] promiscuously, without much regard to or *knowledge of the bank's solvency or willingness to redeem, and, generally, *because* it is a bank bill. Our statutes distinguish between a bank bill and a promissory note; and in all the usages and transactions of life a still more marked distinction appears. A bank bill is designed to perform the office of money, and does perform that office. No citizen can issue such a bill without permission from government; he is punishable by indictment and fine for doing so. The right to coin money, or, what is in effect the same, to issue bills, notes, and obligations, to circulate as money, is a *sovereign* power.

It may well be doubted whether such bills, notes, or obligations are not bills of credit, and the state authority, as to them, within the interdict of the federal constitution. A distinguished American jurist has justly said: "State incorporated banks are a novelty, wholly unforeseen by the constitutions—a vast fungus, grown upon government, upon property, upon liberty, and equality, by which the common welfare is thoroughly affected, and the currency, more than two-thirds of it, engrossed. The power to make currency is a sovereign power. Even granting that a state may farm out or depute such authority, it *must have—it can not alienate—the* right to regulate and control."

If the power of the state to delegate such authority be admitted, still it is a delegation in trust of an admitted branch of sovereignty, and such a franchise must necessarily be conferred, from *public* considerations alone, and because it is *supposed* to be for the public interest. A corporation established upon such a consideration, and for such a purpose, must needs be a *public* corporation. In *The State v. The Commercial Bank*, 10 Ohio, 539, Judge Lane said: "A bank of circulation is created to provide, by its credits, a currency which may serve as money; and whenever this currency becomes

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discredited, irredeemable, inconvertible, so that it no longer fulfills this end, there is a misuser of its powers, such as, upon common law principles, may work a forfeiture."

*I maintain, as to any and all corporations created with [621 exemptions from common liabilities, that their creation and existence are in violation of the first principle of equality in property. And when the legislature authorizes privileged individuals, as a bank, to make currency, it grants what belongs to the public. The resumption of which privilege by the public, without taking the chattels of the bank, affects no property, impairs no contract, infringes no right, but merely restores to its proper place so much of popular sovereignty as was claimed by a grant of questionable authority, and in clear derogation of common right.

But, as respects companies organized under the act of February 24, 1845, "to incorporate the State Bank of Ohio and other banking companies"—that they are essentially *public* in their character is too clear for dispute. That act is, in one sense, a general law. It divided the state into twelve banking districts, and prescribed the number of companies to be established, as well as the amount of capital to be employed in each district. It required certain officers of the state government to take part, as well in the organization as in the continued management of the system. It was in every sense an act to authorize and regulate "banking" as a *public* business. There is no act to divide the state into districts, by counties or otherwise, for agricultural, mechanical, manufacturing, or mercantile purposes; such an idea never occurred to the legislature. I apprehend no satisfactory reason can be assigned why banking under that act should be restricted by districts, or by the number of companies, or by the amount of capital employed, to be organized and regulated in part by officers of the government, unless it was designed to be a public business.

It may, therefore, be declared that the Piqua Branch and all other companies organized under the act of February 24, 1845, are *public* corporations, created for public purposes, and subject to the emergencies of public necessity or policy, as declared from time to time by the legislature. That the charters of such corporations may be repealed or altered *without the consent of the cor- [622 porators was admitted by all the judges in the Dartmouth College case, and is established by many other authorities. Terrel v. Tay-

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lor, 9 Cranch, 43 ; The Town of Marietta v. Fearing, 4 Ohio, 427 ; The People v. Morris, 13 Wend. 325.

Inasmuch as the reasons assigned by the defendant against the rule sought do not contest the regularity of the assessment of the tax, under the law, judgment may be entered in favor of the plaintiff for the amount of the tax so assessed, with five per cent. penalty and interest from the time the same was payable, and the cause may be remanded to the district court for execution.

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The franchise of a private corporation is a trust of civil authority, which, under our system of government, must remain at all times subservient to the public welfare, the chief end and object of the delegation of all civil power by the people, and is, therefore, not the legitimate subject-matter of contract or sale.

The charter of a private corporation is in form, and in its inherent terms and nature a law, and does not possess the essential elements of a contract, to wit; two competent contracting parties, a proper subject-matter, a legal consideration, and a mutuality of obligation; and, therefore, does not come within the purview and true intent of the clause of the Constitution of the United States which prohibits a state from passing any law impairing the obligation of a contract.

The doctrine that the charter of a private corporation is in and of itself a contract between the state and the corporation or corporators, which has taken its origin from, and is founded upon the decision of the supreme court of the United States, in the case of Dartmouth College v. Woodward, 4 Wheaton, does not appear, in the report of that case, to have had the sanction of a majority of the court; Chief Justice Marshall, who delivered the opinion of the court, placing the decision upon the ground, not that the charter granted by the Crown of England (which, by its own inherent terms, was undeniably subject to legislative control) was in and of itself a contract, but that "*the circumstances of the case*" disclosed the existence of a contract for the creation of a trust, and the investment of private property, 623] *consisting of money and lands, for the purposes of education under the authority of the charter, the terms and obligations of which contract were interfered with and impaired by the state law, which was declared unconstitutional.

The legislative power includes as well the power to amend and repeal existing

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laws, as the power to enact laws. And the legislature is incompetent to make any contract or arrangement whereby the legislative power can be, to any extent, surrendered or abridged.

The act entitled "An act to incorporate the State Bank of Ohio and other banking companies," passed February 24, 1845, is a public and general law of the state, and not a contract, either in form or substance; and the essential elements of a contract are not to found either in the law, taken entire, or any special provision of it, within the operation of the prohibitory clause of the constitution of the United States.

While the government is bound in *good faith* to protect and keep inviolate the contracts made, and rights of private property vested under the authority and regulations of the charters of private corporations, in common with all other private property, as one of the sacred and primary objects of all civil government; yet such contracts are made, and property vested subject to the implied condition, that the legislative power of the state remains undiminished in any manner, and always subject to be exercised whenever the paramount object of its creation, the public welfare, shall require it.

The property of every person, however absolute the tenure by which it is held, must be liable to bear an equal and just proportion of the public burdens, by way of taxation, in return for the protection and advantages afforded by the government, and that proportion of taxation must be determined by the legislative power, which extends to all persons and property within the state.

The taxing power, which constitutes a branch of the legislative power, and which is of vital importance, and essential to the existence of government, can not be surrendered or abandoned, either in whole or in part, by the legislature, to promote private and individual interests, so as to limit the power and control of future legislation over it; but like the *right of eminent domain*, and the right of *control over existing laws by amendment and repeal*, both of which are also vital and essential prerogatives of the legislative power, must continue in unabridged subserviency to the *public safety and welfare*, the original and paramount purpose of the delegation of all civil power by the people.

The case of the State of Ohio v. The Commercial Bank of Cincinnati, 7 Ohio, 225, overruled.

RESERVED by the district court of Lucas county for decision by the supreme court.

This is an action of trover instituted in the common pleas, for the alleged unlawful conversion, by the defendants, of *bank bills [624 for the payment of money, and also of coin current in the United States, the property of the plaintiff. Plea, the general issue. Judgment was rendered in the common pleas for the defendants, from which the plaintiff appealed. The reservation of the case was upon

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a submission in the district court, at the August term, 1852, upon the following agreed statement:

"The legislature of the State of Ohio, on the 24th day of February, A. D. 1845, passed an act entitled 'An act to incorporate the State Bank of Ohio, and other banking companies,' which is printed among the general laws of Ohio (vol. 43, p. 24). By the 60th section of said act, it is provided, that,

"Each banking company organized under this act, or accepting thereof and complying with its provisions, shall, semi-annually, on the days designated in the fifty-ninth section for declaring dividends, set off to the state six per centum on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding; *which sum or amount, so set off, shall be in lieu of all taxes to which such company or the stockholders thereof, on account of stock owned therein, would otherwise be subject.* And the cashier shall, within ten days thereafter, inform the auditor of state of the amount so set off, and shall pay the same to the treasurer of state, on the order of said auditor."

On the 13th day of October, A. D. 1845, the said Bank of Toledo, organized as one of the branches of the State Bank, in pursuance of the provisions of said act, and commenced doing business within the corporate limits of said city of Toledo, where it has, at all times since that time, continued to transact business as a bank, having the right to issue bills and notes for circulation; and it has at all times since its organization strictly complied with the provisions of the act above referred to, and is entitled to all the privileges conferred thereby. On the 21st day of March, A. D. 1851, the general assembly of the State of Ohio passed another act entitled "An act to tax banks and bank and other stocks, the same as other property is now taxable by the laws of this state;" which act is printed among the general laws of the State of Ohio (vol. 49, p. 56). By the first section of said last-mentioned act, it is provided,

"That it shall be the duty of the president and cashier of each and every banking institution incorporated by the laws of this state, and having the right to issue bills or notes for circulation, at the time for listing personal property under the laws of this state, to list the capital stock of such banking institution, under oath, at its true value in money, and return the same with the amount of the surplus and contingent fund belonging to such banking institution, to the assessor of the township or ward in which such banking in-

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stitution is located, and the amount so returned shall be placed on the grand duplicate of the proper county, and upon the city duplicate for city taxes, in cases where such city tax does not go upon the grand duplicate, but is collected by the *city officers, and [625 be taxed for the same purposes and to the same extent that personal property is or may be required to be taxed, in the place where such bank is located; and such taxes shall be collected and paid over in the same manner that taxes on other personal property are required by law to be collected and paid over; *Provided, however*, That the capital stock of any bank shall not be returned or taxed for a less amount than its capital stock paid in." By section fifth of said last-mentioned act, it is provided, "That the taxes levied and collected in pursuance of this act shall be in lieu of any taxes which said bank or banking company would, by existing laws, be required to pay on its dividends or profits." And, by section seven, all laws and parts of laws not inconsistent with the provisions of said act were repealed.

After the passage of said last mentioned act, said city of Toledo, claiming the right so to do, in pursuance of the provisions thereof, assessed a tax against said bank amounting to the sum of \$1,957.50. And, in accordance with provisions of its charter, having reference to the collection of taxes on property within its limits, placed the same upon its tax duplicate. On the first Monday of November, 1851, said tax duplicate, having upon it said tax so assessed against said bank as aforesaid, was duly delivered to said John R. Bond, the treasurer of said city, with a warrant thereto annexed, under the hand of the recorder and mayor of said city, commanding said treasurer to collect from said bank said tax assessed as aforesaid against it. Said bank refused to make payment of said tax, and said treasurer, on the 28th day of February, A. D. 1852, collected the same from said bank by distraining current bank bills and gold and silver coin, the property of said bank, of the value of said tax, and has since paid over and accounted for the same to said city. It is further agreed, that said bank has never at any time, directly or indirectly, consented to or acquiesced in the provisions of said act of March 21, 1851, or any other modification or changing of the provisions of said act of February 24, 1845, so far as it provided for the taxation of said bank. It is also further agreed, that said bank has, at all times, set apart and paid, or offered to pay, the taxes which, by the terms of the act of February 24, 1845, it has

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become liable to pay. On the part of the bank, it is here contended that the act of March 21, 1851, so far as it authorizes the assessment of a tax against said bank different from that prescribed by the act of February 24, 1845, is repugnant to the provisions of the constitution of the United States, and therefore inoperative and void. On the part of the defendants, the contrary is claimed. And it is hereby agreed, that if the court shall be of opinion that said act, so far as it authorizes the assessment, is not repugnant to the provisions of the constitution of the United States, judgment may be entered herein in favor of said defendants; but if the court shall be of the opinion that said act is, in the particulars aforesaid, repugnant to said constitution, judgment may be entered against said defendants, in favor of said bank, for the sum of \$1,957.50, with the interest thereon from the 28th day of February, 1852. Either party shall be at liberty to refer, on the trial, or in any hearing which may hereafter be had in the case, whether by writ 626] of error or otherwise, to the several acts of *the general assembly of the State of Ohio, before referred to, and to have the same advantage therefrom that they could have were the same incorporated herein and made part of this agreed statement of facts, or any bill of exceptions which may be taken in the further proceedings herein."

Waite & Young, attorneys for plaintiff.

John Fitch, and *G. E. Pugh*, Attorney-General, for defendants.

The case was submitted in this court on oral argument, with other causes involving the same questions; but no written briefs were furnished by the counsel in this particular case.

BARTLEY, C. J. The only question for adjudication presented by the agreed statement of the parties in this cause, is whether the statute of this state of the 21st of March, 1851, "providing for a tax upon banks and bank and other stocks the same as other property is taxable by the laws of this state," so far as the same authorizes the assessment of a tax upon the property of the Bank of Toledo, is repugnant to that clause of the tenth section of the first article of the constitution of the United States, which is in the following words, to wit: "No state shall pass any law impairing the obligations of a contract." The constitution of Ohio, in force when this law was enacted, contained substantially the same provision, declaring that the legislature should pass no "law impair-

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ing the *validity* of contracts." So that, if the law be repugnant to the constitution of the United States, it was likewise in conflict with the constitution of the state. The investigation of this question involves the following direct inquiries :

First. Whether the statute of this state of the 24th of February, 1845, entitled "an act to incorporate the State Bank of Ohio and other banking companies," (which is claimed to be the charter of the Bank of Toledo as well as that of numerous other banks in the State,) constitutes a contract between the State of Ohio on the one part, and the Bank of Toledo, or the stockholders of that bank, on the *other, within the purview and true intent of the above [627 mentioned prohibitory clause of the constitution of the United States.

Secondly, whether the 60th section, above recited, relating to taxation, contains a material or essential stipulation in such contract, not subject to change or modification by the law-making power of the state, without the consent of the bank.

These inquiries, which *distinctly* and *directly* arise in this case, present questions of very great interest and importance. The question whether the charter of an incorporated bank is a contract within the operation of the Constitution of the United States has occupied the chief attention of the counsel on both sides, been argued at very great length both orally and upon paper, and submitted, with all the lights which extensive research could bring to our aid. The other causes argued and submitted with this case, involved also other questions ; but this cause involves the single subject presented by the agreed statement of the parties. The Bank of Toledo claims exemption from taxation imposed by the law of 1851, on the alleged ground that its charter is a contract within the operation of the constitution ; and whether the charter of this bank be such contract or not, is the main question presented by the parties for our determination. And, although this case might, perhaps, be decided upon other ground, yet since this question, if decided against the plaintiff, would be decisive of the whole case, it would seem like *sheer evasion* on the part of the court to decline its determination on the *pretence* that it did not arise in the case. Such is the nature and importance of the question, and the frequency of its occurrence, that a majority of the court feel no disposition to evade the responsibility of its determination ; but deem it a duty

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to meet it *fully, fairly and frankly*, with the expression of an opinion formed on the most careful and mature consideration.

1. Does the statute of Ohio of the 24th of February, 1845, entitled "An act to incorporate the State Bank of *Ohio and other banking companies," constitute a contract within the operation of the above mentioned prohibitory clause of the constitution of the United States?

It is not claimed on the part of the plaintiff that the law of 1851 impairs the obligation or validity of any contract between the bank and any other person, for the performance of any act or in relation to property in the ordinary signification of that term. But it is claimed that the law of 1845, containing the charter of the company, is a contract between the State of Ohio on the one side, and either the Bank of Toledo or the corporators of the bank on the other; and that the obligation or validity of such contract is impaired by the law of 1851. It is not pretended that any right of private property, in its ordinary sense, or any contract relative thereto, has been interfered with; but it is claimed that the civil privileges of the company, conferred by its franchise, consisting of its rights to act and continue its existence in the capacity of a corporation, to issue its paper for circulation as a currency or money, to be exempt from all taxation, except as specified in the sixtieth section of the law, etc., constitute the subject-matter of a contract, and are in fact property, the right to which has been violated or impaired. The complaint, therefore, is not that the private property of the corporation, or any contract relating thereto, has been invaded; but that its political rights or exclusive privileges have been impaired.

That the restrictive clause of the constitution of the United States, above mentioned, was designed to embrace contracts respecting private property, or some object of pecuniary value, capable of estimation in a court of justice—indeed, any thing which in the ordinary sense constitutes the proper subject-matter of a contract, is not controverted. But whether it was designed to comprehend the political relations between the government and its citizens, the civil privileges and immunities of corporations, and to restrain the state in the regulation of its civil institutions adopted for internal government, is the question here presented.

629] *A full examination of the general question, whether the charter of a private corporation be a contract, which is involved in

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this inquiry, would seem to be requisite, to elucidate the true nature and present bearing of the subject under consideration.

It has been adjudged by the supreme court of the United States, that a state law which interfered with and changed the arrangement made by contract for the disposition of private property; and also at the same time interfered with the franchise of a private corporation, was unconstitutional and void. Such is the effect of the decision in the case of *The Dartmouth College v. Woodward*, 4 Wheat. 518. The doctrine that the charter of a private corporation is a contract within the operation of the restrictive clause of the constitution of the United States, has taken its origin from this case, which, as a judicial authority, does not, in fact, sustain it, as I shall have occasion hereafter to show; yet the doctrine has been recognized and approved by the courts of a number of the states, including the supreme court of Ohio. And it is not to be denied that it has the sanction of authority entitled to great weight and very high consideration. But it is equally undeniable that this doctrine has been recognized by courts, and promulgated by elementary writers, in very general terms, and without a distinct and definite view to the real and authoritative effect of the decision of the supreme court of the United States, upon which it was founded, until it has become, to some extent, a subterfuge for fraud and a means of shielding corporations from responsibility and correction for the abuse of their corporate franchises.

The reason upon which this doctrine has been based has not been universally satisfactory; and the evil consequences to the community, of its general and loose application, in protecting corporations from responsibility for abuse, have made it so frequently a subject of controversy, that, notwithstanding the respect entertained for the authority by which it appears to have been sanctioned, it can not be claimed in fact to be *unquestioned law*. [630] Mere precedent alone is not sufficient to establish and settle forever a legal principle. Infallibility is to be conceded to no human tribunal. A legal principle, to be well settled, must be founded upon *sound reason*, and tend to the purpose of justice. The mere authority of no judicial opinion can place it beyond the reach of inquiry into its reason or its justice. We are taught by an author illustrious for his profound knowledge of the common law, that *law is the perfection of reason*, and that it is the *reason and justice* of a legal principle which give to it its *validity*. True it is, there

are instances where the maxim *Communis error facit jus*, may be applicable; but it is not applicable to a doctrine founded upon a fiction or a fallacy, and which, in its consequences, is subversive of the great ends and purposes of justice. Chancellor Kent, in his Commentaries, vol. 1, page 477, says "That there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our laws impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. *Even a series of decisions are not always evidence of what the law is.*"

I would not be understood as repudiating the aid of precedents, which are properly regarded as the great storehouse of experience, not always to be followed, but to be viewed as beacon lights in the progress of judicial investigation, which, if they do not prove deceptive and conduct us to the paths of error, may light our footsteps in the road to truth. Lessons of wisdom are to be extracted from the errors as well as the rightful judgments of mankind; while the one admonishes and warns, the other stands forth for imitation and adoption. Had precedent *alone* been consulted and followed, the great reforms 631] in the progress of mankind would *never have been adopted. Governments were formerly regarded and conducted chiefly for the aggrandizement of those who possessed and controled the arm of civil power. Sovereignty was supposed to originate with and emanate from the successful leader, who acquired and held it by force under a claim of hereditary title; and the civil government was managed for the benefit of *rulers* rather than *ruled*. But our institutions have been constructed upon an entirely different basis. The supreme civil power is here recognized as originating from, and resting in the people, and government regarded as an institution whose *sole object* is the benefit of the *governed*. Absolute power is delegated to none; and those who are authorized to administer any function of civil power are but agents entrusted with delegated authority to be exercised only for the benefit of those who confer it. Here all civil authority delegated by the people or conferred by the government is a *trust*, which, in its nature, must be at all times subservient to the public good. And no individual ownership or pro-

proprietary interest can be created in a grant of civil authority. The principles of our political system, in some of the details of the public affairs, have been of gradual development; if we follow closely the examples and doctrines of other times and other systems, in determining the nature and extent of the powers distributed and adjusted among the institutions of our own system, we shall be very certain to err, and to be led often to conclusions inconsistent with the true aim and object of our own system of government. A very numerous class of precedents, therefore, are useful in disclosing rather what we should avoid, than what we should follow. In the determination of a great question like that under consideration, recurrence should be had to fundamental principles, and the authority of precedent regarded so far only as there is to be found a conformity to *reason*, and the *true nature* of our own government.

The distinction between the rights of private property and the political rights, privileges, and immunities conferred or authorized by law, from motives of public policy, is **deeply marked* and [632] founded in the nature of the subject-matter to which they respectively pertain. The right of private property is an *original* and *fundamental* right existing anterior to the formation of the government itself; the civil rights, privileges and immunities authorized by law, are *derivative*—mere *incidents* to the political institutions of the country, conferred with a view to the public welfare, and therefore *trusts* of civil power to be exercised for the public benefit. The theory of our government is founded upon the doctrine that all men are born equal, and this principle of equality of political rights lies at the foundation of all our civil institutions. The creation of vested rights, therefore, in the nature of private property, in the special authority and exclusive privileges and exemptions conferred by law upon a few, would be destructive of this fundamental principle of our government. The primary object of the social compact is to protect man in his pursuit of happiness by maintaining this equality of political rights. Government is the necessary burden imposed on man as the only means of securing the protection of his rights. And this protection—the primary and only legitimate purpose of civil government—is accomplished by protecting man in his rights of personal security, personal liberty, and private property. The right of private property being, therefore, an *original right*, which it was one of the primary and most sacred objects of government to secure and protect, is widely and essentially dis-

tinguished in its nature from those exclusive political rights and special privileges and immunities which are created by law and conferred upon a few from motives of public policy in the administration of the government. The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, and prohibiting the enactment of any law impairing the obligations of contracts, were evidently designed to protect the right of private property as one of the primary and original objects of civil society, without any reference to the derivative 633] *rights or exclusive privileges and immunities which might be acquired by a few persons from the political institutions of the government. Independent of the restraints imposed by the declaration of these fundamental principles, the enactment of a law invading the right of private property, or impairing the obligation of a contract, would be a violation of one of the great primary objects for which the government itself was instituted, a usurpation of political power; and the law might well be declared to be void without any express constitutional provision to that effect. *Smith's Com. on Constitutional and Statutory Construction*, 270. *Taylor v. Porter*, 4 Hill, 146; *Varick v. Smith*, 5 Paige, 159; *Bowman v. Middleton*, Bay, 252.

Much has been said about the omnipotence of parliament in England, where there exists no written constitution; but it is admitted and well understood that the omnipotence of parliament signifies nothing more than that parliament is supreme in the exercise of the legislative power of the government, and in that, uncontrolled by any superior. And it is not pretended in that body that its powers of legislation are unlimited in their exercise by the great and fundamental principles of the social compact. We learn from an early period in the parliamentary history of Great Britain, that measures were opposed and defeated in that body, because of a tendency to violate the fundamental and primary objects of government itself, and, therefore, not within the scope of its authority. So that the doctrine that the power of parliament is omnipotent may be considered as resting in theory only. *Parl. Hist.*, 33, 315; 9 Gill and Johns. 409. Some of the most eminent judges of England have never hesitated to declare an act of parliament void, which was against common right and natural justice, or in violation of those original and fundamental rights for the security of which government was instituted. *Bracton L.* 4, 228; *Dr. Bonham's case*,

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8 co. 234, per Coke, C. J.; *London v. Wood*, 8 Mod. 687, 688, per Holt, C. J.; *Day v. Savage*, *Hobart, 87, per Hobart, C. J.; [634 *The Regents of the University of Md. v. Williams*, 9 Gill & Johns. 408, 409, per Buchanan, C. J. Yet, notwithstanding all this, the right of parliament to repeal, modify, and regulate the charters of private corporations has been acknowledged upon all hands, often exercised, and always sustained.

The attempt was made and defeated in the British Parliament, to maintain the special and exclusive rights, privileges, and immunities of a private corporation upon the same ground with the rights of private property secured by *magna charta*. When, in 1783, a bill was introduced into parliament by Mr. Fox, for the purpose of repealing the charter of the East India Company, a charter purchased by the payment of a large bonus, and stamped by repeated acts with the faith of the government, the primary objection made by those who opposed it was "that the bill was an attack upon the chartered rights of men." This objection was met by Mr. Burke, the most learned and profound statesman of his age, with a force and power of argument rarely if ever surpassed by any other argumentative effort. From the speech of Mr. Burke on that occasion, the following extract is in point and appropriate:

"As to the first of these objections, I must observe that the phrase of 'the chartered rights of MEN,' is full of affectation, and very unusual in the discussion of privileges conferred by charters of the present description. But it is not difficult to discover what end that ambiguous mode of expression so often reiterated is meant to answer.

"The rights of MEN, that is to say, the natural rights of mankind, are indeed sacred things; and if any public measure is proved mischievously to affect them, the object ought to be fatal to that measure, even if no charter at all could be set up against it. If these natural rights are further affirmed and declared by express covenants—if they are clearly defined and secured against chicane—against power and authority, by written instruments and positive engagements, they are in a still better condition; they partake not only of the sanctity of the object so secured, but of that solemn public faith itself, which secures an object of such importance. Indeed, this formal recognition by the sovereign power of an original right in the subject, can never be subverted, but by rooting up

the holding radical principles of government, and even of society itself. The charters which we call by distinction *great*, are public instruments of this nature—I mean the charters of King John and 635] King Henry the Third. The *things secured by these instruments may, without any deceitful ambiguity, be very fitly called *the chartered rights of men*.

“These charters have made the very name of a charter dear to the heart of every Englishman. But, sir, there may be, and are, charters not only different in nature, but formed on principles the *very reverse* of the great charter. Of this kind is the charter of the East India company. *Magna charta* is a charter to restrain power and to destroy monopoly. The East India charter is a charter to establish monopoly and to create power. Political power and commercial monopoly are *not* the rights of men, and the rights of them derived from charters it is fallacious and sophistical to call the chartered rights of men. These chartered rights (to speak of such charters and of their effects in terms of the greatest possible moderation) do at least suspend the natural rights of mankind at large, and in their very frame and constitution are liable to fall into direct violation of them.

“But having stated to you of what description the chartered rights are which this bill touches, I feel no difficulty at all in acknowledging the existence of those chartered rights in their fullest extent. They belong to the company in the surest manner, and they are secured to that body by every sort of public sanction. They are stamped by the faith of the parliament; they have been bought for money, for money honestly and fairly paid; they have been bought for a valuable consideration over and over again.

“Those who carry the rights and claims of the company the furthest, do not contend for more than this; and all this I freely grant. But granting all this, they must grant to me in my turn that all political power which is set over men, and that all privileges claimed or exercised in exclusion of them, being wholly artificial, and for so much a derogation from the natural equality of mankind at large, ought to be some way or other exercised ultimately for their benefit.

“If this is true with regard to every species of political dominion and every description of commercial privilege, none of which can be original self-derived rights, or grants for the mere private benefit of the holders, then such rights or privileges, or whatever

else you choose to call them, are all in the strictest sense a *trust*, and it is of the very essence of every trust to be rendered *accountable*, and even totally to *cease*, when it substantially varies from the purposes for which alone it could have a lawful existence. This, I conceive, sir, to be true of trusts of power vested in the highest hands, and of such as seem to hold of no human creature. But about the application of this principle to subordinate derivative trusts, I do not see how a controversy can be maintained. To whom then would I make the East India company accountable? Why, to parliament, to be sure; to parliament, from whom their trust was derived; to parliament, which alone is capable of comprehending the magnitude of its object and its abuse, and alone capable of an effectual legislative remedy."

The true nature of the franchise of a private corporation is here portrayed in clear and comprehensive language. We are here told that it is an institution to *establish monopoly* *and to create [636 *power*; that to speak of such charters and their effects in terms of the greatest possible moderation, they do at least suspend the natural rights of mankind at large, and in their very frame and constitution are liable to fall into a direct violation of them; that all special privileges of this kind, claimed or exercised in exclusion of the greater part of the community, being wholly artificial, and for so much a derogation from the natural equality of mankind at large, ought to be some way or other exercised ultimately for their benefit; and that they are not original self-derived rights, or grants for the mere and sole private benefit of the holders, but rights and privileges, which in the strictest sense are derivative trusts, and from their *very nature* accountable to the power which created them.

The question under consideration being a question of constitutional and statutory construction, must be determined by the application of those well settled and well known rules of interpretation, by which the *true intent and legal effect* of an instrument are ascertained.

If there be anything well settled in the law relating to corporations, it is that their charters, being grants of power or authority in derogation of the natural rights and equality of men, must be construed favorable to the public, and strictly as against the corporation, in whose favor nothing can be claimed by implication. The Proprietors of the Stourbridge Canal v. Wheeling, 2 B. & Ad.

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793; 4 Cruise's Dig. 567; United States v. Arredondo, 6 Pet. 738; Perrine v. The Chesapeake and Delaware Canal Co., 9 How. 172; The Cincinnati College v. The State, 19 Ohio, 110. In the case of the Charles River Bridge v. Warren Bridge et al., Chief Justice Taney, in delivering the opinion of the court, said that, "The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations."

637] *It is a rule of interpretation, of universal application, that a law is to be so construed as to carry out the *intention* of the maker, and that to ascertain that *intention*, not merely is the language of the law to be looked to, but also the subject-matter to which it relates, the evil provided against, and the attending circumstances and understanding at the time the law was framed.

In addition to the aid of those rules of construction and interpretation, in ascertaining the true meaning of the restrictive clause of the constitution of the United States, which declares that no state shall pass any "law impairing the obligations of contracts;" the following expressive language of Chief Justice Marshall, in delivering the opinion of the court, in the case of Dartmouth College v. Woodward, 4 Wheat. 627, will tend to the elucidation of the subject.

"It has been argued that the word 'contract,' in its broadest sense, would comprehend the political relations between the government and its citizens; would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances.

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That, as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term 'contract' must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubted utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it, the state legislatures were forbidden 'to pass any law impairing the obligation of contracts,' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; *and that since [638 the clause in the constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

"The general correctness of these observations can not be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice."

Again, Chief Justice Marshall adds, in reference to the rights claimed in behalf of the corporation (see page 644 of same opinion):

"It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent occurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures."

This lucid exposition of the constitutional provision in question establishes the following positions :

1. That the term "*contract*," as used in this clause of the constitution, is not to be taken in its broad and most comprehensive sense, but on the contrary, must be understood in its more limited signification, and as embracing no other contracts than those of the ordinary kind, respecting property or some right which is an object of value, capable of being asserted in a court of justice, and of the nature of the right of property.

2. That the term "*contract*," as used, does not comprehend the political relations between the government and its citizens, does not extend to the laws concerning the civil institutions of the states, established for the purposes of internal government, and which, to subserve those purposes, must change with circumstances and be modified by ordinary legislation; and that the framers of the constitution did not intend by this provision to restrain the states in the regulation of their civil institutions.

3. That the evil intended to be provided against, by this constitutional restraint, was a course of legislation which had *pre-
639] vailed in many, if not in all of the states, anterior to the formation of the constitution which had weakened the confidence of man in man, and embarrassed all transactions between individuals by dispensing with a faithful performance of contracts of the ordinary character; and that, at the time of the formation of the constitution, the term *contract*, in its ordinary sense, was not understood to comprehend the laws of the states, adopted from motives of public policy, creating private corporations.

We have here, in clear and explicit language, the sense in which the framers of the constitution employed the term "*contract*," in this provision, the circumstances under which it was inserted in the constitution, the mischief designed to be guarded against, and the opinion of the supreme court of the United States, by Chief Justice Marshall, that the provision was never intended by the framers of the constitution to extend to grants of civil authority, or to restrict the legislation of the states in regard to their civil institutions adopted for internal government. It is fair to conclude that if the framers of the constitution had intended this restraint to extend to the civil institutions of the states, and grants of civil authority, that language would have been employed, which, in its ordinary signification, would have been clearly understood to express it. In order to extend this constitutional provision so as to include the charters of corporations, it is necessary, in the first

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place, to adopt the fiction that a law creating a private corporation is a contract; and in the second place, by implication, to attach to the law, as such contract, the condition that it is not to be subject to repeal or alteration at the discretion of the legislature; and in the third place, to enlarge and extend the meaning of this constitutional restraint, by a latitudinous construction, against the clear intention of the framers of the constitution; and all this in violation of that well known rule of construction, that whatever relates to grants of civil authority, in derogation of the natural rights or equality of man, is to be strictly construed.

*The question touching the validity of the law of 1851 arising under the constitution of the United States, is not whether the law divests antecedent vested rights of property, but whether it impairs the obligations of a contract. Chief Justice Taney, in the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 539, says:

"It is very clear that in the form in which this case comes before us, being a writ of error to the state court, the plaintiffs, in claiming under either of these rights, must place themselves on the ground of contracts, and can not support themselves upon the principle that the law divests vested rights. It is well settled by the decisions of this court that state law may be retrospective in its character, and may divest vested rights and yet not violate the constitution of the United States, unless it also impairs the obligations of a contract. In *Satterlee v. Mathewson*, 2 Pet. 413, this court, in speaking of the state law then before them, and interpreting the article in the constitution of the United States which forbids the states to pass laws impairing the obligations of contracts, uses the following language: 'It (the state law) is said to be retrospective; be it so. But retrospective laws that do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument,' (the constitution of the United States); and in another passage in the same case the court say: 'The objection, however, most pressed upon the court and relied upon by counsel for the plaintiff in error was that the effect of this act was to divest rights which were vested by the law in *Satterlee*. There is certainly no part of the constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this, or any circuit court which has condemned such a law upon this ground provided its effect be not to impair the obligation of a contract.'

The same principles were reaffirmed in this court in the last case of Watson and others against Mercer, decided in 1834, 8 Pret. 110: 'as to the first point (say the court) it is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing restrospective laws generally, but only *ex post facto* laws, which relate only to penal and criminal proceedings, and not to civil proceedings which effect private rights restrospectively.'

The general principle that one legislature is competent to repeal or modify any act which a former legislature was competent to pass, and that one legislature can not abridge the powers of a succeeding legislature, is distinctly sanctioned as to all general legislation by the supreme court of the United States in Fletcher v. Peck, 6 Cranch, 87. But it is said that where absolute rights of 641] property have been *acquired and vested by conveyances of the title to, or delivery of the possession of property, under the authority of a law, or where contracts have been made under and in pursuance of the authority of a law, and rights thereby vested, the simple repeal of the law does not divest the rights thus vested. This may be correct as to rights acquired from conveyances or contracts under the law, and pursuant to its authority; but it can not be applicable to rights conferred by the law in and of itself, which are inherent in its terms and can continue only as incidents to the law itself. When property is transferred by conveyance or delivery of possession under the authority of a law, the vested right attaches as an incident to the property, and adheres to and passes with it. So, also, where a contract is made under the authority of a law, the right of property acquired arises not from the law itself but from the contract to which it pertains as an incident. And, in either case, the prospective repeal of the law could not divest the rights thus acquired, originating not in the law itself but in acts done under the law, and which attach as incidents not to the law, but to the property conveyed or contract made under the law. But the franchise of a corporation which consists, not of the rights of property acquired by conveyances, contracts or investments under the authority of the charter, but of the civil rights, privileges and immunities conferred by the law itself and inherent in its terms, is essentially an incident of the law itself, dependent upon the continuance

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of the law, and extinguished by its repeal. For this reason it is claimed that the charter of a *private corporation* is a contract, which from its nature implies a surrender of the legislative power of amendment or repeal. This implied relinquishment of a part of the legislative power of the state, is claimed on the ground of the character of the corporation created, which is alleged to be a mere matter of *private interest*, unconnected with the administration of the public affairs, and therefore not liable to be made subservient to the public welfare by legislative control.

*A corporation is a civil institution. It is established by a [642 law of the state from considerations of public policy. Its existence, its capacities, and its powers are all conferred by law from some real or supposed public benefit to result from it. If this mere creature of the law thus instituted or established, be not a *political institution* of the state, it would be difficult to conceive under what other denomination it could be placed by any sensible distinction which could be invented. Mr. Kyd, a reputable elementary author, has furnished the following comprehensive and descriptive definition: "A corporation, or body politic, or body incorporate, is a collection of many individuals united in one body, under a *special denomination*, having perpetual succession under an artificial form, and vested by the policy of the law with a capacity of acting, in several respects, as an individual, particularly of taking and granting property, contracting obligations, and of suing and being sued; of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence." Kyd on Corp. 13. In England, a corporation is usually created by a charter granted by the King, but sometimes by an act of Parliament. But the supreme court of the United States say, in *Bank of Augusta v. Earle*, 13 Pet. 519, "In this country, no franchise can be held which is not derived from the law of the state." In the latest edition of Angell & Ames on Corp. pp. 3 and 4, the authors say: "The words *incorporation* and *corporation* are frequently confounded, particularly in the old books. The distinction between them is, however, obvious; the one is a *political institution*; the other only the *act* by which that institution is created. When a corporation is said to be a *person*, it is understood to be so only in certain respects and for certain purposes, for it is strictly a *political institu-*

tion." It matters not that private or individual interests may be invested in the corporation, or under the authority of the charter, so far

643] *as this denomination of the institution is concerned. Individual interests or investments in private property exist under a great variety of the civil institutions of the state. Private institutions are those which are created or established by private individuals for their own private purposes. Public institutions are those which are created and exist by law or public authority. Some public benefits or rights may result from the institutions of private individuals or associations. So also some private or individual rights may arise from public institutions. The only sensible distinction between public and private institutions is to be found in the *authority* by which, and the *purpose* for which, they are created and exist. Because, therefore, a corporation may fall under the denomination of *private* corporations, in the artificial distinction between *public* and *private* corporations, it is none the less a public or political institution. The distinction between public and private corporations is somewhat arbitrary, and by no means determines whether the corporation is a public or private institution. If the stock in a banking, railroad, or insurance corporation be exclusively owned by the government, the institution is denominated a public corporation; but if a private individual be allowed to own a single share of the stock, in common with the government, it is said that it becomes a private corporation. Eleemosynary corporations, established for the purpose of public charity or for the advancement of religion, education, or literature, upon donations or bequests made exclusively for these great and beneficial public purposes, without the right to or expectation of dividends, repayment or other individual or private interest therein in future, are denominated private corporations. But an incorporated village, in the use or expenditure of whose property the citizens of the village have individual and private interests, and receive daily individual and private benefits, is denominated a public corporation. To say that an incorporated bank, authorized and created from considerations of public policy, and endowed by law with the extraordinary power and sovereign attribute of creat-

644] ing in *fact the circulating medium of the country, and regulating the standard of value, is not a public institution of the state adopted for the purposes of internal government, because it falls under the artificial denomination of private corporations,

would be arrogant absurdity. And it would be equally as absurd to treat a railroad corporation as a private institution, which is endowed with extensive powers, and the extraordinary sovereign authority of exercising the right of eminent domain by taking private property for *public purposes*. In truth and in reality, whatever arbitrary or fictitious distinctions may have been created by mere verbiage, these corporations are in fact public institutions, created by public authority, from considerations of public policy, and endowed with highly important civil power for the advancement of the public welfare. It would be unreasonable at least (to speak with the greatest moderation), to say that because some private interests are invested in these corporations, that, therefore, they must be denominated *private institutions*, and for that reason placed beyond the reach of responsibility to the law-making power of the state by which they were created. The most sacred rights of private property are made subservient to the public welfare. Under the right of eminent domain, the land which a man has purchased with the fruits of his own labor, even the very spot upon which he has erected his domicile, hallowed by all the associations of home, and to which he holds a title in fee simple evidenced by a patent from the government, may be taken from him, and that too by a corporation, on the ground of subserving the public interests. Shall this be done, and yet the individual interests of the stockholders in this very corporation be placed above and beyond all subserviency to the public welfare, from the paltry consideration, that, although in fact and in reality a *public institution*, the corporation is technically denomination a *private corporation*? To show the utter fallacy of this distinction, the East India company, which held and exercised the right, under a charter from Great Britain, to exclude their fellow subjects from the commerce of half the *globe, to administer an annual revenue of seven millions [645 sterling, to command an army of sixty thousand men, and to dispose of the lives and fortunes of thirty millions of their fellow-creatures, came under this denomination of private corporations!

It is admitted upon all hands that the legislature has control over those corporations which are denominated *public* corporations, either to modify or to repeal their charters, as will best subserve the public interests. But it is claimed that the charters of those corporations, technically denominated *private corporations*, must be regarded as *contracts*, and, therefore, beyond the control and regu-

lation of the law-making power of the state. And this, according to a late elementary work, is "the main distinction between *public and private* corporations." See Angell and Ames on Corp. 27, 28. This distinction is not founded on sound reason, but is based upon a fiction, and has its origin in that short-sighted timidity of capitalists, which distrusts the integrity and stability of the government. The true reason which has given rise to this constructive fiction, is to be found in the following remarks of Angell and Ames on Corp. 730, to wit: "Corporate property and franchises, important as they usually are in amount and extent, and undefended by the same strong sympathies which guard individual rights, offer a more tempting and easier spoil to misguided power, whether it reside in the prince or the people." It is this distrust of the government which has given rise to the doctrine that a charter is a contract; and the whole doctrine of vested rights, which has for its object the establishment of the rights and property of corporations upon a footing of far greater sanctity and permanency than the rights and property of private persons, by placing them beyond the reach of the law-making power of the state. It is a humiliating reflection to the friends of our republican institutions, that the efforts to place the rights and property of corporations upon a footing of greater sanctity than those of private persons have been resisted with far greater success in England than they [646] *have been in this country. The right of parliament to amend or repeal the charters of private corporations has for many years been undisputed. A late elegant and critical historian, in his work of standard authority (see Hallam's Constitutional History of England, 101, 102), places the exercise of the power of the legislative authority to re-mould and regulate the rights and property of corporations upon far slighter grounds and reasons of convenience and public interest, than the rights and property of private persons. The doctrine of vested rights, advocated in this country, which places the adventitious rights resulting from this favored class of our political institutions upon ground of higher regard and sanctity than the fundamental rights of private property in the individual citizen, is truly startling when understood in all its bearings, and has its origin in a groundless and over-reaching timidity. The example of England presents us with no instances of the violation of corporate property and franchises, by the flagrant acts of "misguided power." Upon this subject, the

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following remarks of the late venerable chief justice of this state in our late constitutional convention, as the result of much observation and experience, are not inappropriate:

"Mr. Hitchcock, of Geauga, had said hitherto, and said still, that he saw no objection to giving the general assembly the power to repeal all acts of incorporation. The only consideration was the question of policy, as to the manner in which it should be exercised. Now, the general assembly always had the power to retain the right of repeal of each act of incorporation, and, in his opinion, it should have exercised it in nearly every instance, except in corporations for internal improvements." See Debates and Proceedings of the late Constitutional Convention of Ohio, vol. 2, 619.

Upon this subject we have an example before us more triumphantly convincing than any argument or authority. In the State of New York, since the year 1828, out of abundant caution, and to protect the state and people from this pernicious doctrine of vested right, in regard to corporations, which the courts appeared [647] disposed to adopt, the charter of every corporation which *has been* granted, has been by express statutory provision subjected to alteration, suspension, or repeal, in the discretion of the legislature. And in 1846 the same provision substantially was inserted in the constitution of that state; yet, notwithstanding this fact, it has scarcely escaped the observation of any one that banking, railroad, and other corporations have grown up and existed undisturbed, and internal improvements, commerce, and enterprise generally, flourished in New York to an extent unexampled even in any other state of the Union.

Whether regard be had to the franchise of the corporation alone or to the investments of private property under the authority of the charter, in either instance there exists no *good reason* for the distinction above mentioned between *public* and *private* corporations. The elements of a contract in the grant of the franchise exists in the one case, if it does in the other; and the rights of private property would be invaded or violated by a repeal of the charter in one instance, if they would be in the other. Take, for example, an incorporated village, an incorporated bank, and an incorporated college or church, all but the first of which being denominated private corporations, and let a comparison be made. The citizens of the village apply for a charter. It is granted to them. The franchise confers special privileges, beneficial to the

whole village and each individual citizen of it. The citizens of the village accept the charter, and organize the corporation, and on the faith of the continuance of the charter, the corporate body, by taxation and otherwise, becomes possessed of a valuable property, both real and personal, to be held and used by the corporation for the benefit of the citizens of the village. Where are the constituents or elements of a contract in the case of the bank or the college, or church, which do not exist here? In the case of the bank, the corporators may have a more immediate individual interest in the property of the bank than the citizens of the village in the property of their corporation; but this can not 648] create the distinction, *for such is not the case with the college or the church. The corporation officers and citizens of the village have at least as direct and immediate an interest in the property and business of their corporation as the trustees and members of the church, or the trustees or patrons of the college; and the citizens of the village, in fact, receive a more direct personal and pecuniary advantage from the franchise of their corporation than do the corporators of the college, or the trustees and members of the church, from the franchise.

Again, suppose a repeal of the charter of each one of these corporations. If the obligation of any contract be thereby impaired, or the rights of private property violated, in the one case, the same occurs in the case of each of the others. The franchise conferring special privileges, and civil power and authority in each case, is taken away, and the future benefits or advantages thereof lost by the persons directly or indirectly interested therein. The village corporation may be supposed to own extensive and valuable property acquired from taxes imposed upon the citizens of the village and otherwise, consisting of real estate with valuable buildings thereon, fire engines, water works, stocks, choses in action, and other property acquired and held for the benefit of the citizens of the village; also, private individuals may have acquired important rights of property by contracts or obligations against the corporation, or by leases of buildings, water privileges, market places, licenses, etc. The unconditional repeal of the village charter strips that corporation of its franchise, and extinguishes all its civil authority, and indeed the corporate existence itself. This franchise, or the civil authority and special privileges conferred by it, may have been highly beneficial and of great value to the citizens of

the village. In case of a private corporation, it is this franchise or the authority and privileges conferred by it, which is said to constitute the subject-matter of the contract with the state, which is impaired by the repeal or amendment of the charter. If the franchise, or the civil authority and special privileges conferred by it, constitute the subject of a contract *in the latter case, I can [649 conceive no good reason why it does not in case of the village. In both instances, a corporate franchise is granted by the state, and accepted by the corporators. In both instances, civil power and authority, and special privileges, beneficial to the corporators, are conferred. And in both instances, investments in private property are made under the authority of the charter, and on the faith of its continuance.

The investments in private property, made under the authority of the charter, arise, not from the alleged contract between the corporation and the state, of which the corporate franchise is said to be the subject-matter, but from contracts between the corporation and other persons. The stock in a bank or railroad corporation is held by a contract between the corporation and the stockholder. Contracts are daily made with corporations, and almost daily investments are made in private property, under the authority of their charters; but it is not claimed that the state is a party to any of these transactions. The complaint is not that either the contracts by which investments are made in the stock of the corporation, or the contracts by which the corporation acquires and holds private property, or the contracts out of which arise the liabilities of the corporation to other persons, are impaired by the alteration or repeal of the charter. It is the *charter* or *franchise* of the corporation, which is said to constitute the contract with the state, within the operation of the restrictive clause of the constitution. It does not necessarily follow, as a consequence of the repeal of the charter of a corporation, that the rights of property in the capital stock or the undivided profits, or other property acquired and held under the authority of the charter, will be impaired or lost to those beneficially interested therein. The corporation itself, as an artificial person in the management of the corporate property and business, acts, in fact, only as a trustee for the individual corporators and those interested. "The great object of an incorporation," says Chief Justice Marshall, "is to bestow the character and properties of individuality on a *collective and chang-

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ing body of men." *Providence Bank v. Billings et al.*, 4 Pet. 561. True it is, that, by the common law, on the dissolution of a corporation, its real estate reverts to the grantor and his heirs; its personal estate vests in the state; and the debts due to and from it are wholly extinguished. But the common law, in this particular, is modified by statute, so that such can not be claimed as the necessary consequence of the exercise of the right of repeal. Even, by special provision in the act repealing the charter of a corporation, all the rights of property originating under the authority of the charter can be protected and saved for those beneficially interested. The corporation may be allowed to retain its corporate powers, so far as may be necessary to enable it to settle and close up its affairs, and distribute its stock or property to those interested or equitably entitled to it; or the same object may be accomplished through the intervention of trustees of assignees duly authorized and appointed for that purpose. 2 Kent Com. 247; *Campbell et al. v. The Mississippi Bank*, 6 How. (Miss.), 674; *Nashville Bank v. Petway*, 3 Humph. (Tenn.), 522; *James v. Woodruff*, 10 Paige, 541.

But in case of the repeal of the charter of a village corporation, the difficulty in protecting fully the rights of private property invested under the authority of the charter is at least as great as in the case of that of a private corporation. By the repeal of the charter of a bank, nothing is lost by the corporators but the franchise of the corporation. Provision can be made by which the liabilities of the corporation can be enforced, its debts collected, and the share of each stockholder in the capital stock and undivided profits fully protected and refunded. In case of the repeal of the charter of a village, a college, or a church, the difficulty of refunding or distributing the corporate property to the beneficiaries according to their respective interests therein, may be very considerable; but, in either of these three cases, the corporate property can [651] be protected and managed through the *intervention of trustees appointed from time to time, so as to accomplish the object of the association, without the convenience or aid of the corporate franchise.

It is said that the village corporation is connected with the administration of the public affairs, and therefore subject to control and regulation by the legislative power. But we should not be induced by mere names or technical phrases to overlook the substance

and reason of the thing. Is not an incorporated bank, which is created by the authority of law, and endowed with an attribute of sovereignty, by which it is enabled to create the circulating medium of the country, and to control the standard of value, an institution connected with the internal government, or the administration of the public affairs? With what show of reality can it be claimed that a railroad corporation, endowed with extensive powers, and authorized to take and appropriate private property for public use, upon the ground that its purposes are subservient to the public welfare, is a mere private institution, disconnected with the affairs of the government? A college has for its object the advancement of the cause of education, and a church the cause of religion—both objects of public interest, and both recognized in the constitution of the state as objects deserving the encouragement and favor of the government, from the fact of their being auxiliary to the successful administration of the public affairs. With what accuracy or propriety can either a college or a church, when instituted under the public authority of an act of incorporation, and having for its object these public interests important to the purposes of government, be denominated or treated as a mere private institution?

It is said that in private corporations property is invested by persons for private or individual purposes. But this is not certainly more peculiarly the case in a college or a church corporation, than it is in a village corporation. Private property is frequently acquired by the latter by voluntary subscription and donation, as well as by the former, and the private and individual interests in the property of the *village corporation is more immediate and [652 direct than in that of the college or church corporation.

It is apparent, from a thorough examination of the subject, that the distinction between public and private corporations, as ordinarily recognized in the books, is a mere arbitrary distinction, without foundation in the nature, objects, incidents, or property of this class of institutions. And in truth there exists no sound and well-founded reason for treating the charters of those corporations usually called private corporations as contracts, while the charters of those known as public corporations are not so considered; or for denominating the former as mere private institutions, and the latter as public institutions; and the paramount considerations of the public interests or general welfare would certainly require that the

former should be subject to regulation by the law-making power as well as the latter.

The question under consideration is not one of expediency, but of constitutional legislative power. The frequent and inconsiderate exercise of this power is not proposed. The existence of the right of the legislature to regulate or repeal the charter of a corporation is one thing, and the indiscreet exercise or abuse of that power another, and very different thing. A proposition for the exercise of this power involves the question, not of a *contract*, but of *good faith* on the part of the state in the administration of the public affairs; and it should never be exercised, in relation either to public or private corporations, except upon plain and high considerations of justice and public policy. When a law has been enacted conferring the civil rights of a corporate franchise on an association of individuals, who have, on the inducement thus held out by the government, embarked in any particular business and made extensive investments in property, the right of amending or repealing the law should be exercised with great caution, and a just regard for the private interests involved; and the *public faith* can only be preserved in the exercise of this power by some such paramount considerations *of the public interests and general welfare as justify and call for the exercise of the right of *eminent domain*. When persons engage in business, or make investments in property under the authority, and with the rights, privileges and advantages conferred by any of the laws or public institutions of the state, they do so, relying for their protection not upon the absurd fiction of a private *contract* between themselves and the state, but upon the high and sacred obligations of the *public faith* in the administration of the government.

There are numerous relations arising from the laws and institutions of the state, creating obligations bearing fully as strong a resemblance to a contract, as the charter of a private corporation, which it is conceded do not fall within the scope and operation of the restrictive clause of the constitution of the United States in relation to contracts. Marriage is, in one sense, a *contract*, often involving in its incidents extensive rights to property and important obligations for the support of the wife, and the protection, maintenance, and education of children; yet since the origin of our government, not only this contract, but also the rights and obligations incidental to it, have been subject to legislative control and regula-

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tion in almost every state of the Union. The marriage relation, although it is said to have its foundation in nature, and to be sanctioned by Divine Revelation, yet, in a legal point of view, it is one of the civil institutions of the state, deriving all its legal efficacy and authority from the laws of the state, and therefore not within the operation of this restrictive clause of the constitution of the United States. It is true, however, that Judge Story, in intimating a different opinion in the case of *Dartmouth College v. Woodward*, remarks, that it is only in case of a violation of the marriage contract by one of the parties that the legislature has assumed the authority to grant a divorce. This is not strictly correct. But the advocates of this doctrine of vested rights, including Judge Story, deny the legislative authority to *modify or repeal the [654] charters of private corporations, either in case of the violation or abuse of the corporate franchise, or otherwise; claiming that the question of the violation or abuse of a corporate franchise is a judicial question, and not within the province of the legislature.

A law locating the seat of justice of a newly organized county at a particular village, on a proposition of the citizens of the village, in case of such location to raise means by private contributions to construct the public buildings for the county, is in the nature of a contract. Yet it can not be denied but that after the citizens of the village have complied on their part at great expense to themselves, and also made large investments in property at enhanced prices in view of the advantage of such location of the county-seat, the legislature may, from considerations of the public interests, remove by law such county-seat to some other place, or repeal the law creating the county, and thus not only divest the citizens of the village of the advantages of the county-seat, but also strip the county officers of the emoluments, special privileges, and civil authority conferred by their respective offices. And such legislative act would present a question not of *contract* but of the *public faith*.

A license granted under the authority of law for a stipulated sum of money, and for a specified period of time, to a traveling merchant, to exercise certain special and exclusive privileges forbidden to the community at large in the sale of goods, wares, and merchandise within the state, is a franchise, and possesses more clearly the elements of a contract than the franchise of a private corporation obtained without the payment of a bonus; yet the authority

of the legislature to repeal the law and revoke the license can not be questioned.

A license to keep a tavern or house of public entertainment, or to retail spirituous liquors ; a license to keep a ferry ; and a license to exercise the duties or business of an auctioneer ; each and all of these, and many others of a similar character, are special and ex- 655] clusive rights and privileges *granted under the authority of law for stipulated sums of money and for specified periods of time. They are franchises, and partake much of the nature of contracts. A franchise is nothing more than a liberty to exercise certain special and exclusive privileges withheld from the community at large. 1 W. Blackstone, 37. Yet the constitutional authority of the legislature to regulate and control these licenses or franchises, with a view to the overruling considerations of the public welfare is unquestionable. A law granting a pension to a person in consideration of public services, is in the nature of a grant or contract, but it is undeniable that such pension may be changed, suspended, or abolished by the amendment or repeal of the law.

A public office conferring, as it usually does, a special privilege, and the civil authority to exercise a public employment and a right to the emoluments or profits belonging thereto, bears a close analogy to a franchise, and presents the elements of a contract more strongly than the charter of a corporation. Yet an officer who has abandoned his business and changed his residence to the injury of his private interests, to perform the duties of his public employment, for the faithful discharge of which during his term of office he is bound in a bond with sureties under a heavy penalty, may be divested of his rights, privileges, and emoluments, by a repeal of the law creating the office. It is true, that Judge Hitchcock, in delivering the opinion of the court in the case of *The State v. McCollister*, 11 Ohio, 49, says, that the incumbent of an office "*has a vested right in his office*" from which he can not be "ousted by direct legislation." I do not understand the learned judge to mean anything more than that the incumbent has an existing legal right in the office, from which the legislature has no power to dismiss him by any direct act, or to divest him by a law prospectively adding new qualifications for the office. If anything more than this was intended or expressed, it is clearly not law ; for it is well settled in this country that the incumbent may be deprived of an office by its 656] abolishment or repeal. The **State v. Dews*, Charleton, 397 ;

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Butler v. The State of Pennsylvania, 10 How. 402; The Commonwealth v. Bacon, 6 Serg. & R. 322; The Commonwealth v. Mann, 5 Watts & S. 418; Barker v. The City of Pittsburg, 4 Penn. St. 51; The Commonwealth v. Clarke, 7 Watts & S. 127; Conner v. The City of New York, 2 Sandford, 355.

The legislature of this state, by a single law, passed March 6, 1845, entitled, "An act to amend an act entitled an act to abolish the board of canal commissioners and revive the board of public works, etc.," divested several hundred public officers, engineers, collectors of tolls, and other public agents, of their public employment before the expiration of their term of service. And the same legislature, on the 12th March, 1845, by an act entitled, "An act to provide for the state printing," repealed the office of state printer, and thus deprived the public printer of the state of the rights, privileges, and profits of his public employment in the midst of his term, notwithstanding he was under bond with security in the penal sum of ten thousand dollars for the faithful discharge of his duties, and had made necessary investments in printing materials, etc., to the amount of some thirty or forty thousand dollars for the execution of the public printing during his term. And a bill in chancery filed in the supreme court of the state, by the public printer thus deprived of his situation, to enjoin the secretary, auditor, and treasurer of state from the violation of his contract, by the execution of this law, was, upon full hearing upon the merits, dismissed by the court, and the exercise of this power by the legislature fully sustained. See Records S. C. Franklin county.

When the rights and special privileges of persons, arising under *such* engagements with the state, presenting in a much stronger light the essential elements of a contract than is to be found in the charter of a private corporation, are thus subject to regulation and repeal by the law-making power of the state, it would seem that it was time that the doctrine of vested rights in regard to corporations in Ohio, at least, should be dropped and allowed to pass into oblivion.

*The term "contract," in the constitution of the United [657 States, must, as Chief Justice Marshall says, be understood in its ordinary and limited signification, and not as extending to the rights and engagements created by or arising from the laws and civil institutions of the state. The charter of a private corporation does not, in truth and in reality, comprise the essential elements of a contract in its ordinary sense when applied to property, or some

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object of value. These essential elements of a contract are the following, to wit: 1. The *assent or agreement* of two competent parties. 2. A legal and competent *object or subject-matter*. 3. A mutual legal *consideration*. 4. And a *mutuality of obligation*. In the absence of either one of these essential requisites, there is no contract. Are they to be found in the charter of a corporation?

1. It is claimed that the parties to the contract consist of the government on the one part, and the corporation or the individual corporators on the other. The advocates of this doctrine differ somewhat among themselves, whether the *artificial person* or the *individual corporators*, constitute the latter party. Mr. Justice Story, in the case of *Dartmouth College v. Woodward*, argues at great length to show that it is the corporation which is the party to the contract. He places the doctrine, however, on either alternative, leaving its advocates to select either, as may best suit their views. Mr. Justice Washington, in his opinion in the same case, and Chancellor Kent, in his *Commentaries*, place it upon the ground of a contract between the government and the individual corporators. But Judge Hitchcock, in the case of *The State of Ohio v. The Com. Bank of Cincinnati*, 7 Ohio, 128, says, "*that it is well settled*" to be a contract "between the state and the *corporation*;" and he refers to the decision in the *Dartmouth College* case to sustain him!

It may be a matter of some importance to settle this question as to the real party to the contract, if there be one. The individual corporators, whether taken *collectively* or *severally*, are changeable; 658] and those who are the corporators *one year may not be the next. And the grant of a franchise, which is said to be the consideration on the part of the government, is not made to the individual corporators, but to the artificial person; and in one class of eleemosynary corporations, especially, the corporators are not even the beneficiaries of the grant. And again, where no bonus is paid by the corporators, the only consideration claimed to be received by the government is from the corporation, and not the individual corporators. On the other hand, if it be insisted that the corporation is the true party, the question is not without difficulty. At the time of the grant of the franchise, and the acceptance and organization under the charter, which is said to constitute the assent or agreement of the two parties, the artificial person is a nonentity—is without existence or the power of entering into a

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contract. The charter is said to be an executed contract; and how can the artificial being, which is said to be created by, or to arise from, the execution of the contract, be one of the original parties in its formation?

Again, it is said that the legislature acts as the agent of the state in making this contract. An agent, in order to make a contract for the principal, must be empowered with competent authority so to do. It is well settled that the legislature can exercise no powers except such as are expressly granted, and their necessary incidents. Legislative authority is, in very general terms, vested in the general assembly, which may by law authorize and direct the making of contracts; but the making of a contract on the part of the state, as well as the execution of it, belongs peculiarly to the executive, and not to the legislative branch of the government. It is very clear that the authority of making contracts is not among the *express powers* of the general assembly; and I apprehend it would be difficult to show it to be *necessarily incidental* to any of them.

2. The object or subject-matter of the contract, according to this doctrine of vested rights, is the corporate franchise, which consists of the civil power and authority granted by the *government [659 creating the body corporate, and clothing it with certain civil rights, powers, and privileges withheld from the community at large. [See opinions of Mr. Justice Story and Mr. Justice Washington, in *Dartmouth College v. Woodward*, 4 Wheat.; Ang. & A. on Corp. 68.] A franchise in England is defined to be a royal privilege, or a branch of the royal prerogative subsisting in the hands of a person by a grant from the crown. [2 W. Bl. 37; 4 Cruise's Dig. 564.] There are various kinds of franchises; and, according to Blackstone, "It is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession, and to do other corporate acts." According to this, a *corporate franchise* is a branch of the prerogative of government, or, in other words, a special grant of a portion of the *civil authority* of government in the hands of certain persons.

And the question here presented is whether the civil authority or power of the government, granted or conferred in any manner, can be made the legitimate subject-matter of a contract. I entertain the opinion clearly that it can not, within the true intent and meaning of the restrictive clause of the constitution of the United States.

In this county no vested right of private property can exist or be held in the civil power or authority of government. Our constitution declares that the sole object of government is to secure to the people the blessings of liberty and promote their common welfare. Our government being one of delegated powers, founded upon the principle that sovereignty is inherent in the people; that civil power and authority is expressly delegated to the government only for the public good; and that all power and authority not expressly delegated remains with the people; it follows that the civil power delegated to the government is a high and sacred *trust*, to be exercised solely for the equal protection and common benefit of the people. No portion of it can be sold out by the government, or parted with by contract. When, in the establishment of the civil 660] institutions of the *state, or in the administration of the government, civil power and authority is vested or delegated to any person or persons, it is still a *trust*, to be exercised pursuant to the design of its original delegation by the people, and ever subject to control and regulation for that purpose. The claim, therefore, that vested rights of private property can be created and held in the civil authority, or special privileges granted or conferred by the government, is in derogation of the fundamental principles of all civil government in this country.

In England, franchises, offices and dignities or degrees of nobility, are held to be incorporeal hereditaments, in which a man may have a property or estate. 1 W. Bl. ch. 12; 2 Ib. 37. According to Blackstone, a man may have an estate in a public office, either to himself and his heirs, or for life, or for a term of years, or during pleasure only. Ib. vol. 2, page 36. So also with dignities and franchises. But the theory and foundation of the British government is essentially different from ours. The sovereignty there is said to be in the king instead of the people; and the king, whose power in one sense is unlimited, and whose dignity is supreme, is the original source of all civil power and authority. He is said to be the fountain of justice and the source of all titles of nobility, offices and privileges. 1 Bl. 271. He can create and confer at pleasure franchises, offices and dignities for a term of years, for life, or as estates of inheritance. 1 Bl. Com. 252 and 353; also Bacon's Abr. title prerogative, and Appendix, same title, D. It is in the exercise of these high powers that the king, by his letters patent, creates corporations. The king, as the original source or *proprietor* of honor,

office and privilege, may grant or confer franchises, offices and titles of nobility in such manner as to create vested rights of property in them. This, however, is upon the principle that government is instituted for the benefit of the RULERS rather than the GOVERNED.

But no such power or authority is vested in our government. The legislature can grant no franchise, office or privilege as the original source or proprietor of civil power and *authority. [661] It may, however, within the scope of its delegated power, create offices and confer franchises and privileges as trusts to be used for the public good; but if, from such delegation of civil authority, individual and private advantage result, it is not in the nature of a vested right of private property.

It would seem that some of the courts and judges in this country have held franchises, offices, and privileges to be private property and the subject-matter of private contracts, upon the authority of the laws of England, without taking into consideration the great and fundamental distinction between the source and the object of all civil authority in that country and in this. Mr. Justice Story, in his opinion in *Dartmouth College v. Woodward*, 4 Wheat. 699, says: "The truth is that all incorporeal hereditaments, whether they be immunities, dignities, offices, or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them, in case of any injury, obstruction, or disseizin of them. Whenever they are the subjects of a contract or grant, they are just as much within the reach of the constitution as any other grant." The learned judge treats civil "immunities, dignities, offices, and franchises" in this country as "incorporeal hereditaments"—that is, property capable of inheritance!

The bill of rights in the constitution of Ohio, under which the law in controversy was enacted, contained the following restriction: "That no hereditary emoluments, privileges, or honors shall ever be granted or conferred by this state." It would be difficult to conceive how offices, franchises, and immunities could be conferred as incorporeal hereditaments or privileges, or estates capable of being hereditary, without a conflict with this constitutional provision.

The language of Judge Story is somewhat vague, and not expressive of any very definite conception of what constitutes property. Every right "deemed valuable in law," and "to support

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and recover which a legal remedy is afforded," is not property. A 662] trust, public or private, may be deemed *valuable and be protected by legal process, yet the trustee not hold any proprietary interest in it. A right to exercise the employment of a public office and receive the emoluments may be valuable to the incumbent, and may be asserted and maintained by him in a court of justice; yet it is well settled that it is not property. The right of property consists in the absolute dominion over a thing, in the use, enjoyment, and disposal of it, without any control or diminution, save only by the laws of the land. 1 Wend. Black. 138. According to a standard elementary author, "*Property* consists of those things which belong to us by that exclusive right which enables us to exclude all others from having anything at all to do with them;" and in defining property, the author adds: "*Property*, considered as an exclusive right to things, contains not only a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them." Rutherford's Inst. 20; Puffendorf's Laws of Nature, 220. Franchises, offices, and immunities, therefore, are not and can not be made property in this country, in the correct legal sense of that term. They are *mere trusts* of civil authority, derived from, or branches of that civil power which belongs to the people in their sovereign capacity, and which was delegated by them to be used through the agency of government solely and alone for the public good. This civil power, therefore, which belongs to the people at large as a community, and which in its exercise must always be subservient to the public welfare as its paramount and controlling purpose, can not be abridged or parted with by private contract, can not be made the legitimate object or subject-matter of private property, can not be used for mere private and individual advantage, and no vested right of private property in it can be granted by the legislative power without a violation of its public trust.

663] *I am aware that the supreme court of the United States have, in several instances, and especially in the case of *West River Bridge v. Dix*, 6 How. 507, assumed the position that the franchise of a private corporation is private property. But, with great deference for the opinion of that court, I apprehend that this has been adopted as "law taken for granted," without investigation.

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In the case cited the question was not even discussed, but taken for granted both by the court and by the counsel. This opinion that the franchise of a corporation is private property appears to have had its origin in the doctrine prevailing in England, and which is not applicable in this country, and to be founded on the authority of the Dartmouth College case, which, on examination, does not sustain it. And the reason assigned for this position in the opinion of the court in the case of *West River Bridge v. Dix* is that "it is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment." This does not furnish a satisfactory test that a franchise is private property. It is not every right which is valuable, and for an invasion or disturbance of which, in its enjoyment, a right of action is authorized, that constitutes private property. The right of a public or municipal corporation in its franchise may be valuable, and for an encroachment upon which a right of action is authorized; yet this is admitted not to be private property. The right to a public office may be valuable; for any disturbance in the enjoyment of which a right of action is authorized. The right of suffrage may be valuable—is held dear by all freemen—and for a disturbance in the exercise of which a right of action exists; yet it is not a matter of private property. These are political rights, important, valuable, and capable of being asserted in a court of justice; yet they are clearly distinguished from the rights of private property. The rights of personal liberty and personal security are distinguished from the rights of private property; yet they are valuable, and may be maintained by legal process as even *more sacred than the latter. The rights of private prop- [664] erty, as well as the rights of personal liberty and personal security, are original and fundamental rights, existing anterior to and independent of civil government; but the franchise of a corporation is an adventitious or derivative right, originating in the government—a trust of civil power granted or delegated in the administration of the public affairs; and, although private or individual interests may result from it, and private property be invested in business under its authority, and with the advantage of its privileges; yet the political right, the franchise itself, must remain subservient to the paramount object of its creation—the original object of all delegated civil power—the *public welfare*. And, although this right may be valuable, and may be asserted in a

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court of justice, it can not be made the subject of private property until the theory and fundamental principles of our government are changed, until the people part with their sovereignty, and civil power, cut loose from its subserviency to the public good, becomes arbitrary. When it shall be established that government is instituted for the benefit of rulers rather than the people, then civil power may be made the subject of barter and sale, and vested estates of inheritance, or for life, or for years, in the special privileges of civil authority, be created for mere private and individual advantage, as appears to be the case in England. But, even in England, where it is said that franchises, offices, and dignities or degrees of nobility are the subjects of private property, in which hereditary estates, or estates for life or for years are created, and may exist, these rights are not placed above or made independent of the paramount object of all civil government by the fiction and inviolate sanctity of a contract, but are liable to be made subservient to the public welfare by the legislative control of parliament.

3. *Without a sufficient legal consideration, there is no contract.* What, even in the semblance of a consideration, was received by the state from the Bank of Toledo for its charter? The investments 665] made by the stockholders in the stock *of the corporation were not for the benefit of the state, but their own individual and private interests. The only pretense of a consideration set up is that an advantage or benefit to the public results from the business of the corporation. About this, a difference of opinion might exist. But, be that as it may, this can be nothing more than that incidental or consequential benefit likely to accrue to the community at large from the successful prosecution of any of the useful branches of industry. The corporation, although a political institution, created by public authority, from considerations of public policy, is devoted to its own peculiar business and interests, and does not *engage* or *obligate* itself, in any manner, to serve the public or the state, as a consideration for its charter. No damage or loss is sustained, or act done, or to be done, on the part of the company, or even a pepper-corn rendered, *with a view* to a consideration or compensation for the charter. Angell & Ames, in their *Elementary Treatise on the Law of Private Corporations*, say (page 28): "In all the last named and other like corporations, the acts done by them are done with a view to their own interest; and if thereby they incidentally promote that of the public, it can not reasonably

be supposed they do it from any spirit of liberality they have beyond that of their fellow-citizens.

4. *Without a mutual and binding obligation, there can be no contract.* Wherein consists the binding obligation on the part of the company? The corporators are under no obligation to accept the charter, and exercise its functions after it is granted. This is a mere voluntary matter upon their part. And if they do accept the charter, and organize under it, they are under no binding obligation to continue the corporation or business during the term of the charter; but they are at liberty to dissolve the corporation and discontinue the business at pleasure. Where, then, is the obligation on the part of the company? It can not consist in the observance of its duty as a corporation. The action of the body corporate is limited by the extent of its corporate powers. This is *not a matter of obligation, but of power, inasmuch as it is [666 well settled that a corporation can do no legal and valid act beyond the scope of its corporate authority.

The charter of a corporation in this country is a legislative enactment, possessing the form and essential parts of a law, but not those of a contract; and, in Ohio, it is published, distributed, and judicially noticed as a public statute. The enactment of laws belongs peculiarly to the legislative, but the making and execution of contracts to the executive department of the state. There is no better settled rule of law than that, where one of the parties to a contract has violated the terms and conditions of it, the other party may rescind or disregard it. And it would seem that to revoke or rescind a franchise, by the repeal of a charter, on the ground of its violation or abuse, would be at least as appropriately a legislative act as that of entering into or making a contract.

But if the charter of a corporation, which possesses all the forms and essential parts of a law, be a contract, such contract is contained in the provisions of a law, and must, *as such contract*, embrace the inherent incidents of the law, and thus, by its own terms, be subject to modification and repeal by the legislature. This legislative power includes as well the power to amend or repeal laws as the power to enact them. The one is the necessary incident of the other. This fundamental principle is given to us by very high authority, in the following language:

"The legislative power implies a power not only of making laws, but of altering and repealing them. As the circumstances, either

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of the state itself, or of the several individuals which compose it, are changed, such claims and such duties as might once be beneficial, may become useless, burdensome, or even hurtful. If, therefore, the legislative power could not change the rules which it prescribes, so as to suit them to the circumstances of the body politic, and of the members of that body, it could not answer the purposes for which it was established, and could not, at all times, settle their claims and their duties, in such a manner as is most conducive to the good of the whole, and of the several individuals which make up that whole." Rutherford's Inst. 270.

667] *When, therefore, the legislature enacts a law, the right to amend or repeal it, is implied in its terms as one of the incidents of it, and inherent in the power which created it. This is admitted as a general principle, but it is claimed that there is an exception to it, in the case of a law creating a private corporation, that, in such case, the legislature part with the right of amendment or repeal, unless it be reserved by express provision. The ground of this exception is not easy of comprehension. It is not to be found in any express provision of the constitution, and it is difficult at least to perceive how it can be derived by implication, either from the constitution or the law itself.

The doctrine that the right of amendment or repeal is thus parted with by *mere implication*, is reversing the well settled principle that public grants are to be strictly construed, and nothing derived from them by *implication*. And in the case of *The Providence Bank v. Billings*, 4 Pet. 514, it is very clearly settled, that any rights or privileges, which may exempt a corporation from the ordinary burdens or liabilities common in laws applicable to individuals, do not flow necessarily from the charter, but must be clearly expressed in it, or they do not exist. The right of amendment and repeal being a highly important fundamental right, inherent in the legislative power itself, the great interests of the community are concerned in preserving it undiminished; and if it could be surrendered or diminished in any instance whatever, it must be by *express provision*; and the community has a right to insist that the abandonment of such a right is not to be taken from *mere implication and presumption*, where the deliberate purpose or intention on the part of the state to make such surrender or abandonment does not expressly and positively appear.

The legislative authority of the state, which is the most import-

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ant prerogative of sovereign authority conferred by the people on the government, is, in general terms, vested in the general assembly. This high civil authority, *which includes the power of legislative control over all existing laws, by *amendment or repeal*, is not [668 subject to surrender or diminution, but must remain the same in the general assembly at each session. Every law must be subject to the implied condition of this legislative control. This is the great safeguard in the hands of the people, to prevent the legislative power from becoming absolute and tyrannical. If the legislature could, in the enactment of laws at one session, by contract or otherwise, abridge the legislative authority at a subsequent session, and thus provide against either the repeal or amendment of its enactments in future, this power would soon become absolute and dangerous. The constitution, which is the fundamental law of the state, made by the people themselves in their sovereign capacity, is *alone* beyond legislative control. If the legislature could enact laws, and, by contract, part with the legislative control over them, they would have all the permanency of the constitution itself. The claim that the general assembly can, in the absence of any constitutional provision authorizing it, part with any legislative power, or by contract limit or restrain the future exercise of this high civil function, is, to say the least, grossly absurd. In every view of the subject, therefore, there can exist no *real necessity* for any express reservation, in the enactment of any law, of the right of modification or repeal, which, out of abundant caution, has been sometimes made in the charters of private corporations.

If, therefore, a law creating a corporation be a contract, it must, in its nature, and by its own terms, be subject to modification or repeal, at the discretion of the legislature. The amendment or repeal of the charter of a corporation (if it be contract), not being in violation of its terms, therefore, could not be said to impair or invalidate the obligations of such contract.

But the whole doctrine that the charter of a private corporation is a contract is founded on a fiction, at variance with the truth or real fact existing. An ordinary act of incorporation contains nothing more than the usual stipulations and provisions to be found in laws generally. Persons asking for the passage of a law incorporating a company do **not* in fact think of such a thing as a [669 negotiation for entering into a contract with the state. And the members of the legislature, in the enactment of such laws, never

imagine that they are negotiating and settling the terms and conditions of a contract on behalf of the state; and much less, that they are, by contract, surrendering or parting with a portion of the legislative power of regulation and repeal. In every point of view, therefore, the idea that the charter of a corporation is a contract, whereby this legislative power of regulation and repeal is bargained away, or disposed of by contract, is a legal fiction in opposition to the truth of the fact, and the obvious intention of the persons interested. Courts should not thus treat those high trusts of civil authority, and by legal intendments and mere technical reasoning take away from the state any portion of that power over its own internal police and government which may be highly important to its own well-being and prosperity.

It is claimed, however, that this doctrine—that the charter of a private corporation is a contract, has been settled by authority which places it beyond the reach of controversy at this late day. I admit that much authority can be produced on this subject. But a close examination of its true effect, and the grounds upon which it rests, has reminded me of some stringent but practical remarks of Lord Denman, C. J., in delivering judgment in the House of Lords, in the recent case of *O'Connel v. Regina*, involving some important legal and constitutional doctrines, in the course of which he took occasion to remark: "That a large portion of that *legal opinion*, which has passed current for law, falls within the description of '*law taken for granted*;' and that when, in the pursuit of truth, we are bound to investigate the grounds of the law, it is plain, and has often been proven by recent experience, that the mere statement and re-statement of a doctrine—the mere repetition of the *catalena* of lawyers—can not make it law."

I have already remarked that this whole doctrine of vested rights [670] of private property in the franchises of corporations *is founded on the decision of the supreme court of the United States in the case of *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518. And all the other adjudications, both by the state, as well as the national courts, and the opinions of elementary authors, in which this doctrine has been recognized, have been based upon the decision of this case. If, therefore, the doctrine be not clearly and satisfactorily established by this case, it is not well sustained by authority. True it is, that several decisions of the supreme court of the United States, made prior to that of the *Dartmouth*

College case, have been referred to in support of this doctrine, but on examination they will be found to bear no analogy whatever in principle. Those cases are as follows : *Fletcher v. Peck*, 6 Cranch, 87, was a case where the legislature of Georgia passed an act divesting a beneficial estate in lands granted and conveyed by deed to a number of individuals in pursuance of a law of the state authorizing it. The case of *The State of New Jersey v. Wilson*, 7 Cranch, 43, related to an interest in lands secured by an express contract contained in a public treaty of cession with the Indians, whereby the privilege of exemption from taxation was said to be indelibly impressed upon the lands, and could not, as was held, be taken away without a violation of the public faith solemnly pledged to the people of another nation. *Terret v. Taylor*, 9 Cranch, 43, was the case of an attempt, under a law of Virginia, to divest an interest in lands conveyed by deed, and vested under the authority of law. In all these cases, the laws held to be void affected contracts in the ordinary signification of the term, and relating to rights of private property of a permanent and unquestionable character.

What, then, is true effect of the case of *The Trustees of Dartmouth College v. Woodward*, as *judicial authority*, upon the question under consideration? This was an action of trover, instituted in the State of New Hampshire by the trustees of Dartmouth College against William H. Woodward, for the alleged wrongful conversion of *the books, records, and other corporate property, to [671 which the plaintiffs claimed to be entitled. It was not, therefore, for any infringement or invasion of a *corporate franchise*, but for an alleged injury to the plaintiffs in their right to certain *goods and chattels* to which they claimed to be entitled, that the suit was brought. The defendant sought to justify himself by certain laws enacted by the legislature of New Hampshire, remodeling and reorganizing Dartmouth College, which in substance and effect created a new corporation, by the name of the trustees of Dartmouth University, to be subject to the direction and government of the state authorities, and which required all the property and effects of the trustees of Dartmouth College to be transferred to the new corporation. There was a special verdict of a jury in the superior court of New Hampshire, finding the facts of the case, upon which that court rendered judgment in favor of the defendant.

It appears in the case that about the year 1734 the Rev. Eleazer

Wheelock, an eminent philanthropist, established, at his own expense and on his own estate, a charity school for the education and instruction of Indians in the christian religion. His success in this pious work induced him to solicit contributions for carrying on and enlarging his undertaking, and extending it to the education of English youth and any others. He accordingly obtained large contributions of money from benevolent persons in England, and extensive donations of land from persons in New Hampshire. And, as the *founder* of the college, he duly appointed sundry persons trustees of the institution, who accepted the trust. And this appointment he confirmed by a provision in his last will and testament. Subsequently, he made application to King George the Third for a charter, for the incorporation of the institution, requesting that the persons named by him in his last will as trustees should be made members of the proposed corporation. The charter was accordingly in due form granted in the year 1769, naming Eleazer Wheelock as the founder of the college and appointing him president 672] *thereof, also appointing the trustees, making them the members of the corporation, fixing their number permanently at twelve, and authorizing them to appoint and displace professors and other officers of the institution, and to supply any vacancy which might occur in their own body. In this form the institution was continued till 1816, when the legislature of New Hampshire passed the law, the constitutionality of which was contested in this proceeding.

The bare statement of the case is sufficient to show that this case can not be directly in point upon the question whether the *franchise* of a corporation conferred by a law duly enacted by legislative authority in this country is a contract within the operation of the constitution of the United States. And the state laws drawn into the controversy in the case did not simply interfere with the charter, but transferred the private property held by the trustees to another corporation, in violation of the terms of the contract by which the trust had been created and the property invested. Here was a contract, in the ordinary signification of the term, by which private property to a large amount had been invested in a particular manner, and for a special object, and which was impaired or materially changed by these state enactments.

Chief Justice Marshall delivered the opinion of the court in the case, placing it upon the only ground upon which, as it would appear, a

majority of the court concurred in the decision. Mr. Justice Story and Mr. Justice Washington each delivered his opinion in the case at great length, placing it exclusively upon the ground that the charter of a private corporation was a contract within the meaning of the constitution. But the Chief Justice does not place the decision of the case upon that ground; and in no part of the opinion does he use any expression which in any manner conveys the idea that the charter granted by the Crown was in and of itself a contract. On the contrary, the opinion is placed distinctly and clearly upon the ground, not that the charter, but that "*the circumstances of the case*" disclosed the existence of a contract, the terms of which were impaired by the legislative enactments in question. [673] The chief justice, after narrating the particular circumstances of the case at some length, on page 627, says:

"It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for that object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found."

Large contributions of property had been made for the objects of the institution, which, on the faith of the charter, were conveyed and invested. Here, undoubtedly, was a contract in its ordinary meaning—a contract between the contributors of the property and the corporators by which a trust was created, and the property conveyed and invested. This was nothing more than the contract usually made by the donor, stockholder, or other contributor for the investment of private property under the authority of a charter. Whether it be in public or private corporations, the investments are always made on *the faith* of the continuance of the charter. The public faith is involved in matter by the circumstances. There is no contract here with the government. The contract is between the individual stockholders or contributors and the corporation or corporators; and the state becomes a party to the transaction, not in the capacity of one of the contracting parties, but in its sovereign capacity as the civil government of the country, instituted to protect the rights and advance the common wel-

fare, and upon which is enjoined by the circumstances the duty of exercising *good faith* in granting and continuing the civil privileges conferred by the charter.

Again, on page 642, Chief Justice Marshall says :

"These gifts were made, not indeed to make a *profit* for the donors or their posterity, but for something in their opinion of inestimable value, for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated was the perpetual application of the fund to its object, in the mode prescribed by themselves."

And on pages 643 and 644 he adds :

674] *"This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution."

Besides the donors and trustees, the crown is here named as one of the original parties to the contract. But the meaning of the learned chief justice is sufficiently apparent from the connection in which the expression is used. The crown was a *party to the transaction* out of which the contract arose, and which enjoined the duty of good faith on the government in the continuance of the charter. He denominates the contract "a contract for the security and disposition of property," by which he could have meant nothing else than the contract creating the trust and making the investment of the property. In no place does he speak of it as a contract for the grant of a *corporate franchise*. It was not pretended that any consideration was paid to the government. According to this opinion of the court, the subject-matter of the contract impaired was not the corporate franchise, but the conveyance and disposition of property for a special object, under the authority of the charter. Contracts are always made on the faith of the existing laws and civil regulations relating to their subject-matter. The laws of the

place where a contract is made, relating to its subject-matter, are said to be embraced by implication in the terms of the contract. So this contract for the creation of a trust and the investment of property embraced the terms of the charter, and was made on the faith of it. And nothing more than *good faith* in the administration of the public affairs in relation to the charter could have been implied on the part of the government; for the right of the legislative power in England to repeal this charter at any time was unquestionable, and by implication embraced in the terms of the charter itself.

*There can be no reason for doubt as to the true ground [675 upon which this decision rests. In the concluding part of the opinion, when speaking in reference to the manner in which the contract was impaired by the legislative enactment, Chief Justice Marshall says, on pages 652 and 653:

"The management and application of the funds of this eleemosynary institution, which were placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors in every essential operation of the college. This is not an immaterial change. The founder of the college *contracted*, not merely for the *perpetual application* of the funds which they gave, to the objects for which those funds were given; they contracted also to *secure* that application by the constitution of the corporation."

"In the view which has been taken of this interesting case, the court has confined itself to the *rights* possessed by the trustees, as the assignees and representatives of the donors and founders for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interests in themselves as the law may respect," etc.

In every instance in which Chief Justice Marshall, in this opinion, alludes to the contract, which he says "*the circumstances of the case constitute*," he expressly refers to the contract for the investment and perpetual application of the property for the purposes of the trust. And, in concluding, he says that the court has confined itself, in the view taken of the case, to the *rights* possessed by the trustees as the assignees and representatives of the donors and founders of the institution, etc. It was not, therefore, the *rights*

of the corporation to the *civil privileges* of the *corporate franchise* which were taken into consideration in the decision, but the *rights* of the *donors and founders* held by their assignees or representatives, and these rights were such only as were secured by the contract creating the trust, and making the appropriation of the property. The contract taken into consideration was a contract for the investment of property under the charter, and not the franchise itself. In no instance in the course of the decision does Chief Justice Marshall attempt to show, or even use the expression, that the charter of a corporation is of itself a contract, or that the civil 676] *privileges of a corporate franchise constitute the legitimate subject-matter of a contract. On the contrary, the contract which he shows to have been violated by the legislative act in question, was a contract in the ordinary signification of the term, relating to the investment of private property and the creation of a trust.

It appears from the report of the case that Mr. Justice Johnson concurred in the decision for the *reason* stated by the chief justice; that Mr. Justice Livingston concurred for the reasons stated by the chief justice, and also those stated by Justices Story and Washington; but Mr. Justice Duvall dissented from the decision; Mr. Justice Tod being absent during the term on account of ill-health. So that Justices Story and Washington had the concurrence only of Mr. Justice Livingston, in placing the case upon the ground that the charter granted by the crown of England to the trustees of Dartmouth College was a contract within the operation of the constitution of the United States. And the chief justice and Mr. Justice Johnson having placed the decision distinctly upon a different ground, and Mr. Justice Duvall having dissented from the decision, it does not appear in the report of the case that the position of Justices Story and Washington had the concurrence of more than one-half of the court. Justices Story and Washington doubtless concurred in *reasons* stated by the chief justice, but they went a step further, and assumed the additional ground that the *charter* of the corporation in and of itself was a contract, the terms of which were infringed by the legislative act in question; and in this it does not appear that they had the concurrence of more than Mr. Justice Livingston. So that upon the question whether the *franchise* of the corporation was a contract or not, the court must have been equally divided.

There appears to have been a zealous anxiety on the part of a

portion of the court to establish the doctrine that the charter of a private corporation was a contract within the operation of the constitution of the United States. And, *strange as it may ap- [677 pear, it is nevertheless true, that the syllabus of this case announces the leading principle settled in the case to be that the charter granted by the British crown to the trustees of the Dartmouth College was a contract within the meaning of the restraining clause of the constitution of the United States above recited—a doctrine which does not appear to have had the concurrence of more than half of the court!

On the supposition that this charter of King George the Third was a contract, how could its terms have been violated by the legislative enactments remodeling and amending it? The right of parliament at the time it was granted, and at any time prior to the revolution to amend or repeal it, was admitted by all. The existing right of amendment and repeal by the law-making power was one of the conditions or regulations under which the charter was granted, and, therefore, of course, by implication embraced in its terms. It has been settled that, by the revolution which separated this country from the British empire, all the powers of the British government over existing institutions devolved on the states. So that the legislature of New Hampshire became clothed with all the legislative powers of parliament over this corporation. It can not be claimed that any new conditions were added to the terms of the charter by the change effected by the revolution. The right of amendment and repeal being, therefore, inherent in the terms of the charter from the time of its original grant, even admitting it to have been a contract, the legislative acts of New Hampshire could not have impaired its obligations, or violated its terms as such contract, so far as the franchise itself was concerned. This is most clearly sustained by the doctrine laid down by the supreme court of the United States in the case of the *West River Bridge Company v. Dix et al.*, 6 How. 532, 533, in which case, Mr. Justice Daniel, in delivering the opinion of the court, says:

“The impairing of contracts inhibited by the constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcement of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace the proceedings attempting the *interpolation of [678 some new term or condition foreign to the original agreement, and,

therefore, inconsistent with it and violative thereof. . . . But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation; for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, whenever a necessity for their exercise shall occur."

The charter of Dartmouth College being, therefore, by its own inherent terms, subject to legislative control, this decision can be maintained *solely and alone* on the ground that the state laws in question interfered with and impaired the contract for the investment of the property under the authority of the charter, by a change which transferred this property to another corporation, and altered the *purposes*, the *mode*, and the *authority* for its management and application. If the decision be not sustainable on this ground, *it is not law*.

Such, then, upon full and fair examination, is the effect of the decision of the supreme court of the United States in the Dartmouth College case. And it is *perfectly clear* that it does not satisfactorily *establish or sustain* the doctrine that the *civil rights and privileges* conferred by the franchise of a private corporation constitute a contract, or the legitimate subject-matter of a contract. This doctrine, however, which is sustained by the syllabus of the case, but not by either the opinion of the majority of the court or by sound reason and good sense, has been recognized as *established law* by numerous subsequent decisions, both by the supreme court of the United States and by the courts of many of the states of the Union. These subsequent decisions being cases in which this doctrine was not fully examined, but resting on the Dartmouth College case as authority to sustain them, must fall within that class of current legal opinion which is denominated by Lord Denman "*law taken for granted*." And it would not seem necessary to occupy time and space here by special reference to them.

679] *The case, however, of *The State of Ohio v. The Commercial Bank of Cincinnati*, 7 Ohio, 125, having been designed to

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establish this doctrine as the settled law of Ohio, is entitled to more particular notice. This was a suit instituted in behalf of the state against the bank, to recover the tax assessed under a law of the state passed March 12, 1831, entitled "An act to tax bank, insurance, and bridge companies," imposing a tax of five per cent. on the dividends of all such companies. The bank was incorporated in 1829, and the sixth section of the charter contained the following provision: "That the State of Ohio shall be entitled to receive *four per cent.* on all dividends made by said bank." The law of 1831, by a general provision, fixed the tax upon all banks in the state at *five per cent.* on their dividends. The increase of *one per cent.* was the tribute claimed by the state from this bank under the circumstances. And this it refused to pay, to recover which the suit was brought. There was no clause in the charter of this bank expressly limiting the power of taxation, or in any manner expressly exempting it from any other or different rate of taxation. The majority of the court, however, Mr. Justice Collett dissenting, decided the cause in favor of the bank, upon the authority of the doctrine *supposed* to be established by the decision in the Dartmouth College case. Mr. Justice Hitchcock, in delivering the opinion of the court, says (page 128):

"We take it to be well settled that the charter of a private corporation is in the nature of a contract between the state and the corporation. *Had there ever been any doubts upon this subject, those doubts* must have been removed by the decision of the supreme court of the United States in the case of *Woodward v. Dartmouth College* (4 Wheat. 516). Powers once granted can not be revoked," etc.

Superficial, indeed, must have been the examination given, in this instance, to the authority relied on, and upon the weight of which a most important cause was decided. The inaccuracy in the effect given to the authority referred to is characteristic of the case with which the doctrine of the mere syllabus of the case has been adopted as "*law taken for granted.*" The authority cited wholly fails to sustain this **decision*, notwithstanding the learned [680] judge says, with such confidence, "that it must have removed all doubts, had there ever been any doubts on this subject."

The reasoning in this opinion of Judge Hitchcock is as unsatisfactory as the reference relied on to sustain him. He admits that a corporation may be taxed with as much propriety as a natural

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person, and that an act of incorporation, silent on the subject of taxation, does not exempt the body corporate from the exercise of the taxing power, and the decision of this case stands on the ground that the clause of the charter above recited is a material stipulation in a contract, and to show the existence of the contract, the learned judge reasons as follows (pages 128, 129):

"The general assembly propose to confer upon such persons as shall become stockholders in the bank, certain powers and privileges. They propose to confer upon them all the privileges of banking. But as these privileges are valuable to the recipients, it seems to be but right and proper that a suitable return should be made for the benefit received. Therefore, the legislature imposed upon the corporators, in their corporate capacity, the condition that they shall pay to the state *four per cent.* on their dividends, and they reserve to themselves no right to change these terms. The only consideration to be paid is this four per cent. In other words, the general assembly say to such persons as may take the stock, you may enjoy the privilege of banking, if you will consent to pay to the State of Ohio for this privilege four per cent. on your dividends, as they shall from time to time be made. The charter is accepted, the stock is subscribed, and the corporation pays or is willing to pay the consideration stipulated, to wit, the four per cent. Here is a contract, specific in its terms, easy to be understood."

This is the kind of a contract which it is claimed places the corporation beyond the control of the law-making power of the state. The benefits of the contract, however, are all on one side. How is the state a beneficiary in this contract? How is "*that suitable return*" made to the state, which, it is said, was "but right and proper" for these "valuable privileges?" The stipulated four per cent. as the "*suitable return*," turns out to be a mere limitation upon the taxing power of the state, a most important stipulation in favor of the bank. Without this stipulation, it is admitted, the state might tax the bank not only this four per cent., but any other rate 681] of taxation above *that* amount, which might be found expedient and proper. This "*suitable return*" or *beneficial consideration* to the state in the supposed contract, was, therefore, according to this very decision under consideration, a mere restraint upon the power of taxation, which prevented the state, according to this decision, from imposing upon this bank an amount of tax equal to

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that which was imposed upon the other banks of the state. Verily, the citizens of the state should be grateful for this *valuable consideration*, rendered by the bank as a "*suitable return*" for its valuable privileges!

Again, to sustain this decision I find the following reasoning on page 131 :

"Another view may be taken of the case, which goes to strengthen the positions already assumed. This bank, by its charter, is bound to pay into the state treasury four per cent. on its dividends as they are made. Suppose the legislature reduce the tax upon banks to two or three per cent., or suppose they should entirely repeal the laws taxing banks, etc., still the Commercial Bank would be bound to pay the four per cent. Its charter would remain the same, and its liability would not be altered. If, then, a repeal of the laws taxing banks would not operate to the advantage of this institution, certainly a general law increasing the tax ought not to operate to its injury."

To what weight is a decision entitled, supported by such reasoning? This was truly giving stability to the charter of a corporation! If the legislature could not lessen the tax on this bank, it certainly could not increase it. But is a single remark necessary to show the fallacy of such reasoning? Had a general law been passed exempting all the banks in the state from taxation, is it likely that this bank would have generously come forward and paid its four per cent. tax upon the patriotic claim that the state had not the power to relinquish or discharge, either in whole or in part, the claim for taxes assessed against? This, however, is as accurate as the broad, unqualified declaration, "Powers once granted can not be revoked!"

The supreme court of the United States have greatly restricted and qualified the doctrine promulgated as law established by the decision in the Dartmouth College case. It is no longer held by this tribunal that the right of property in a corporation is *more sacred* than the same *right could possibly be in the person [682 of a citizen; "an opinion, which," in the language of Mr. Justice Daniel, "must be without any grounds to rest upon, until it can be demonstrated either that the *ideal creature* is more than a person, or the *corporeal being* is less." See *West River Bridge Company v. Dix*, 6 How. 533. It was settled in the cases of *The Charles River Bridge v. Warren Bridge*, and *Providence Bank v. Billings*, that

public grants are to be strictly construed; that corporations can claim no privileges or exemptions by *implication or presumption*; that any privileges which may exempt corporations from the burdens common to individuals do not flow necessarily from their charters, but must be conferred by *express provision*, or they do not exist. And in the latter case it is settled that the taxing power, being of vital importance and essential to the very existence of the government itself, even if it could be limited or bargained away by contract, such relinquishment can not be derived from implication or *presumption*, and that in the absence of an express provision, clearly declarative of the deliberate purpose of the state to make such relinquishment, no such exemption can be set up. This doctrine of the supreme court of the United States is in direct conflict with the decision in the case of *The State v. The Commercial Bank*, above mentioned. There was no provision in the charter of this bank *expressly limiting* the power of taxation, yet the court in this decision find such limitation by *implication and presumption*. The doctrine of the court in the case of the Commercial Bank, if it were law, would enable corporations to derive privileges and immunities from mere implication and presumption tending to control, or at least to restrict the power and duty of government in its high function of advancing and protecting the general good.

In the case of *The Charles River Bridge Company v. Warren Bridge Company*, 11 Pet. 420, it appeared that in 1650 the legislature of the then colony of Massachusetts granted to the corporation of Harvard College the liberty and authority to dispose of a *ferry* [683] passing over Charles river, between *Boston and Charlestown, the revenue arising from which ferry had been by previous acts given to the college. And in 1785, the legislature of the State of Massachusetts, without the consent of the college, incorporated the proprietors of the Charles River Bridge, with the authority to build and continue a toll-bridge over Charles river, in the place where the ferry was then kept, subject, among other liabilities, to the payment of an annuity of two hundred pounds to Harvard College. The bridge was built, and the privileges of the company somewhat modified by subsequent acts. But during the continuance of the franchise of this corporation, in 1828, the legislature incorporated the proprietors of Warren Bridge, with authority to build a bridge over the same river, between Boston and Charlestown, within a few hundred feet of the other bridge, and which

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was in a short time to become a free bridge; by means of which, the franchise of the other corporation was rendered wholly valueless. This was done without any provision for compensation to the proprietors of Charles River Bridge for the injury to their franchise; and the constitutionality of the act was sustained on full investigation, both by the supreme court of Massachusetts and the supreme court of the United States, upon the grounds substantially of the paramount considerations of the public interests, and the fact that the charter of the Charles River Bridge Company contained no express provision inhibiting the erection of the other bridge.

In the case of *Phalen v. The Commonwealth of Virginia*, 8 How. 163, it appeared that, in 1829, the legislature of Virginia granted to the Fauquier and Alexandria Turnpike Road Company the benefit of the privilege of raising \$30,000, by way of lotteries, through the agency of five commissioners appointed for that purpose, for the improvement and repair of the road of the company. And, in 1834, the legislature passed an act for the suppression of lotteries, under severe penalties, which limited and abridged the privilege previously granted to the turnpike corporation; and the question whether the grant of this valuable right or franchise to the company *was a contract within the protection of the consti- [684] tution of the United States was carried to the supreme court of the United States, where it was adjudged that, among others, the ground of public policy, and the duty of the state to suppress nuisances injurious to the public morals, justified the law of 1834, even if it did invade the sanctity of a corporate franchise.

In the case of *Armington et al. v. Barnet et al.*, 15 Ver. 745, it was held by the supreme court of Vermont, that an act of the legislature, authorizing the easement or franchise of a turnpike corporation, to be taken and subjected to the purposes of a free public highway, provision being made for compensation to the corporation, was constitutional on the ground that the public good required it. The same principle was settled by the supreme court of New Hampshire, in the case of *Barber et al. v. Andover*, 8 N. H. 398.

In the case of the *Turnpike Company v. Railroad Company*, 10 Gill & Johns, 392, it was held by the supreme court of Maryland, that where a corporation, under a charter duly authorizing it, had constructed a turnpike road, and was in the full enjoyment of its corporate privilege, that the construction of a railroad, by a com-

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pany under a subsequent charter between the same *termini*, and upon the same line of travel, which rendered the franchise and the road of this turnpike company of but little value, was not an unconstitutional or wrongful act, which would sustain an action of trespass.

In the case of *The Enfield Toll-Bridge Company v. The Hartford and New Haven Railroad Company*, 17 Conn. 455, it was held, by the supreme court of Connecticut, that where an incorporated bridge company had constructed a toll-bridge across the Connecticut river, from Enfield to Suffield, in whose charter it was expressly provided that no person or persons should have liberty to erect another bridge any where between the north line of Enfield and the south line of Windsor, the right of a railroad company, subsequently incorporated, to construct a bridge across the Connecticut river, between the north line of Enfield and the south line of 685] *Windsor, on the line of its railroad, and which would divert a part of the travel from the toll bridge, was constitutional, a compensation being made or tendered to the bridge corporation for the damage.

In the case of *The Boston Water-Power Company v. The Boston and Worcester Railroad Corporation*, 23 Pick. 361, where a corporation, under the authority of its charter, had constructed a dam over an arm of the sea, near Boston, and also certain basins, raceways, etc., and erected mills in connection therewith, with full authority to use the lands in the basins, derived partly from the state and partly from individuals, and also to use, sell, or lease the water power thus created, it was adjudged by the supreme court of Massachusetts, that an act of the legislature incorporating a railroad company and authorizing the construction of a railroad across these basins, causing obstruction and injury to the water power, etc., and providing for a compensation to be made for the diminution and injury to the water power, *but providing no compensation for the injury to the franchise of the corporation*, was constitutional and valid.

In the case of *Brown v. The Penobscot Bank*, 8 Mass. 445, the supreme court of Massachusetts held that a law passed in 1809, imposing upon the corporate privileges of the banks of that state the condition of the payment of two per cent. per month, by each bank, on the amount of its bills, the payment of which should be by such bank refused, was not in conflict with any provision in the consti-

tution, either of the United States or of the State of Massachusetts.

I might continue this reference to cases to an almost infinite extent, in which the constitutionality of laws have been sustained, which encroached upon and impaired, to some extent, the franchises and privileges of private corporations. But I shall conclude these references by the case of *The West River Bridge Company v. Dix et al.*, 6 How. 507, in which the supreme court of the United States settled the principle that the franchise, as well as the property of a private corporation, might be taken under the authority of a state law, and made subservient to the public welfare, in the exercise of the right of *eminent domain*. This is a very important qualification of the doctrine of the inviolability of the charters of private corporations. It appears to be now settled by authority that, in the exercise of the right of *eminent domain*, the franchise of a corporation owning a ferry must give way to a law establishing a toll bridge; that the franchise of a corporation owning a toll bridge may, by law, be subjected to the public use, by the establishment of a free bridge; and that the franchise of a turnpike corporation may be, by law, subjected to the purposes either of a free road or of a railroad.

The doctrine of the right of *eminent domain* is extensively reviewed by Chancellor Walworth, in the case of *Beekman v. The Saratoga and Schenectady Railroad Company*, 3 Paige, 45, in which it was decided that this prerogative of sovereign authority could be exercised by the legislative power, not only where the *safety*, but also where the *interest* and even the *convenience* of the state is concerned; and that, in exercise of this high function of the government, the right of private property and many other rights must yield and become subservient to the *public welfare*. It is well settled that the exercise of the right of eminent domain rests with the legislature, which alone has the authority to determine *when* the public use shall require the assumption of private property, and to *regulate* the mode of compensation. 2 Kent. Com. 340.

This principle, therefore, settled by the supreme court of the United States, places corporate franchises under the control of the legislative authority, whenever either the public *safety*, the public *interest*, or even the public *convenience* shall demand it. The exercise of the legislative right of amendment or repeal stands upon fully as high ground as this. Those who oppose the doctrine of

inviolable vested rights in corporate franchises have never claimed the exercise of the right of the legislative power to amend or repeal charters, except where the public *safety* or public *interest* 687] *absolutely demand it, and then only in such manner as would do no violence or injustice to any rights of private property which might be affected thereby.

The restrictive clause in the constitution of the United States inhibiting the enactment of any law by state authority impairing the obligations of a contract, contains no qualification, and does not except the case of the exercise of the right of *eminent domain*, or any other instance of public emergency. And the constitution of the United States contains no provision *authorizing* or prescribing the *mode* for the exercise of the right of eminent domain by state authority, or requiring *compensation* to be made where private property is taken for public use by state authority. It has been settled that the provision in the fifth article in the amendments to the constitution of the United States, declaring that private property shall not be taken for public use without just compensation, is a limitation on the exercise of power by the general government, and is not applicable to legislation by the states. *Barron v. The Mayor and Council of Baltimore*, 7 Pet. 243. The constitution does not prohibit a state from impairing the obligations of a contract, unless compensation be made; but the inhibition is *absolute*. So that all acts coming within the prohibition are unconstitutional. If the charter of a corporation, therefore, be a contract, upon what ground can it be subjected to the public use, in the exercise of the right of *eminent domain*, without a conflict with the constitutional restriction for the protection of contracts? It is said that the *lex loci* enters into the terms of all contracts, and annexes to them conditions not arising out of the literal terms of the contracts themselves, but superinduced by the pre-existing and higher authority of the laws of the community to which the parties belong, with a knowledge of which, and with reference to the binding obligations of which, they must be presumed to act. Upon this principle it is said that all contracts are made and rights acquired in subordination to the paramount power and duty of the state to protect and promote the public good; and that this liability 688] *to be made subservient to the public welfare, although *tacit* and *implied*, is a condition inherent in all contracts and acquired rights, and of paramount and controlling operation. Upon this ground

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it is said that the right of *eminent domain* is exercised without impairing the obligations of contracts, and in conformity to an essential and inseparable condition, whenever the *public safety*, *public interest*, or *public convenience* may require it. The right to the exercise of this high function depends upon the demand or requirement of the public interest; and this must be determined by the legislative power, which includes as well *the control over existing laws by amendment or repeal*, as the power of *eminent domain*.

The legislative power is the most important attribute of government. It is delegated with a view to protect and advance the public welfare, and can be legitimately exercised only when the public *safety*, the *public interest*, or *public convenience* may require it. The legislative power includes both the exercise of the right of *eminent domain*, and the right of *control over existing laws, by amendment or repeal*, as *incidents* or *means* of executing its high functions. To protect and advance the public welfare is as well the *object* of the right of amendment or repeal as that of the right of *eminent domain*. Both these important powers rest upon the same ground, both are exercised for the accomplishment of the same general object, the advancement of the *public welfare*, and both are included as *means* or *instruments* within the control of the legislative authority. It is said that the right of *eminent domain* is essential to the accomplishment of the great object of government, and can not be parted with or abridged. Equally so is the right of legislative control over existing laws. These are both high prerogatives of sovereign authority, essential for the protection and advancement of the public welfare, and neither can be parted with or abridged by contract or otherwise, without an alteration of the fundamental law of the state. As all contracts and vested rights of property are held subject to the *tacit* and *implied* condition, of a liability of being subjected to the public use by the right of *eminent domain*, *so all laws, whether acts of incorporation in the [689 nature of contracts or not, must also be in the same manner subject to the *implied* liability of amendment or repeal by the legislative power. The rights of private property, as well as the derivative rights resulting from the civil institutions of the state, must all yield to the paramount and overruling consideration of the public interest. And if the franchise of a corporation may be made subservient to the public welfare by the right of *eminent domain*, it would be strange, indeed, if the same thing could not be also done

in the exercise of the right of amendment and repeal. In either case the legislature have the power to render compensation, or provide the mode for doing it, should justice to the rights of any person concerned require it. In the exercise of either power, the paramount and controlling object is the *public interest*; and it is *this* which calls for and justifies in all cases the exercise of civil authority. If, therefore, the *public safety* or *public interest* shall require either the amendment or the repeal of the charter of a private corporation, the paramount object of the legislative authority must prevail; and should justice require it, compensation can be made for any private damage which may be sustained; but if the corporation shall have forfeited its charter by the abuse of its franchise, there is no object of value taken away for which compensation could be made. It is said that compensation for the property taken is essential to the exercise of the right of eminent domain. But where a corporate franchise has been forfeited by abuse, and the public safety requires its repeal, it would scarcely be claimed that the legislative power could be restrained by the consideration that there was no object of value for which compensation could in justice be made. It is said that to find the forfeiture of a franchise is a *judicial act*. In some cases this may require the searching investigation of a court of justice. But the right of amending and repealing laws is a *legislative act*, which no constitutional restraint requires to be delayed or to give way for a *judicial act*. The legislative power often makes the investigation, and finds 690] the facts which constitute *the basis for its action; and where the abuse of a corporate franchise is notorious and palpable, there can be no reason or good sense in requiring a ten years' litigation in going through the forms, delays, vexations, and expenses of a suit against a corporation, to ascertain what no one in the world would deny, and which the legislature can act upon as an undeniable matter of public notoriety.

The decisions relied on to sustain the position that the charter of a corporation is a contract, relate to corporate franchises derived either from private statutes, or grants of charters from the crown of England. It has never been adjudged by any court, on deliberate investigation, that a public statute or general law, under the authority of which corporations, or associations in the nature of corporations, were formed, was a contract, and consequently not subject to amendment or repeal by the legislative power of the

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state. Mr. Webster, as counsel for the plaintiffs in the Dartmouth case, (4 Wheat. 580, 581) urged that the statutes of New Hampshire in question, being private statutes affecting only particular persons and their peculiar privileges, were not "*laws of the land*," within the meaning of the constitution of that state; and to sustain his position he relied on the distinction of Blackstone and Coke, that a law is "not an order from a superior, to, or concerning a particular person, but something permanent, uniform and universal;" and that a particular act of the legislature, not having relation to the community at large, was rather a sentence or decree than a law. 1 Bl. Com. 44; Co. Lit, 46. In England private statutes, and the king's grants, although always subject to legislative control, partake much of the nature of contracts. Blackstone, treating of private statutes (2 W. Bl. 345) says, "a law thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not, therefore, allowed to be a *public*, but a mere *private* statute; it is not printed or published among the other laws of the session; it hath been relieved against, when *obtained upon fraudulent suggestions; it hath been holden to be void, if contrary to law and reason; and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded." We learn from Chancellor Kent (see 1 Kent's Com. 506), "that there is a material distinction between public and private statutes, and that the books abound with cases explaining this distinction in its application to particular statutes." Public statutes relate to the community at large, and are binding upon all persons and interests, where applicable. Statutes generally are public acts; a private statute is said to be an exception to the general rule. It operates only upon a particular thing or private persons, and is said not to bind or conclude strangers to its provisions.

Whatever ground may have existed for holding the elements of a contract to exist in the terms of a private statute, which withdrew it from legislative control, such a doctrine would be wholly inapplicable to public and general laws, which, having relation to the whole community and being binding upon all, must be controlled by the legislative power with a view to the general good, and can not be made subservient to mere individual or private interests.

The law under which the Bank of Toledo claims its authority as a body corporate is a *public statute*, of general operation, and pub-

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lished and distributed with the general laws of the state. True it is entitled "an act to incorporate the State Bank of Ohio and other banking companies." But its title is not expressive of its true character. It creates no state bank, or bank in which the state is in any manner interested as a stockholder; neither does it incorporate any specified company or persons in the usual form of a special act of incorporation. It names or designates no particular person or persons upon whom it confers corporate rights. It fixes the general terms, conditions and regulations, under which companies throughout the state are authorized to organize. It contains not only the general regulations for the government of the business of banking in the state, but also provisions general in their 692] nature, in relation *to revenue for general purposes, and penal enactments, which would have been appropriate provisions in the criminal laws of the state. It is not a special act of incorporation—not a private or local statute; but a public and general statute in its character, its provisions and its operations, and so treated by the legislature, and so recognized by all the departments of the state. It will scarcely be claimed on behalf of the plaintiff that this law was enacted merely to promote and protect the private interests of those who might engage in business under it. Its object was to establish a system of public policy, which must be presumed, at least, to be *intended* to advance the public welfare. It contains neither the form nor the substance of a contract. Where a private statute is enacted, making a special grant to a particular individual or set of individuals designated, there may be found, by construction, the semblance of a contract. But here is a general law fixing the terms and regulations of a general system, under which a particular kind of business may be carried on by such persons as may see proper to form companies, and can bring themselves within its requirements.

The essential elements of a contract are not to be found either in the law, taken entire, or in any particular provision of it. No *obligation* is imposed on any person to engage in business under its regulations. Those who form associations and engage in banking under the system, do it solely from considerations of their own personal and private interests. The state does not in any manner engage or employ them. They pay the state no bonus or compensation for their privileges; and they are at liberty to discontinue the business whenever they may determine that their private interests

require it. If any supposed advantages result incidentally to the public, it does not arise from any *obligation* imposed on the bankers, and is, therefore, only that consequential benefit which may accrue to the public from the business authorized by law in any of the other pursuits of the people. General laws may be enacted, conferring special advantages to encourage particular productions in *agricultural, mechanical, and other pursuits; a tariff may [693 be established for the special advantage and protection of domestic manufactures; and yet, however the obligations of *good faith* on the part of the government may be involved in the matter, no one will claim any such law to constitute a contract.

If the charter of a company formed under this banking law constitutes a contract within the operation of the prohibitory clause of the constitution of the United States, there must exist a *mutuality of obligation* having relation to a right to something which can be asserted in a court of justice. According to Chief Justice Marshall's opinion in the Dartmouth College case, this is the only kind of a contract to which this constitutional provision was designed to apply. If such a charter be this kind of contract, the specific performance of it could be enforced by a bill in equity, or the breach of it would lay the foundation for an action for damages. This is a *test* of the existence of a contract. Suppose a bank should refuse to perform its duty in accordance with the terms of the charter, could the state sustain a bill in equity to compel a specific execution of the contract on the part of the bank? What kind of a decree could the state take against the bank under such a proceeding? Again, suppose a breach of the terms of the charter by the bank, could the state sustain an action against the bank for a breach of a contract? What form of action would lie? What would be the measure of the damages, or the ground for the assessment? A writ of *quo warranto* might be brought for a forfeiture of the franchise, a proceeding not applicable to contracts; or a mandamus might lie to compel, *not the performance of a contract*, but the performance of some duty enjoined by law. But a bill in equity to compel the specific execution of the terms of the charter as a contract or a suit for damages for a breach of the charter as such contract, would be a novel proceeding. Such a thing has never been attempted, and never would be sustained. The bank may be under some legal liability or obligation to conform its *action to the terms of the [694 law in the execution of its powers. But this does not constitute a

contract, and the state could assert no right in a court of justice to damages or redress for a breach of any such duty.

This law contains no provision inhibiting the right of amendment or repeal, and, by its inherent terms, would be subject to legislative control as much as any other general law on the statute book. If the charter of a banking company under the law be a contract, such contract must embrace the terms of the law and be comprehended, in fact, within its provisions; and, therefore, by its own terms, subject to legislative control. It is said that a contract, to be obligatory, need not contain an express provision that the parties to it shall not violate its conditions. This is true, but not applicable. Here the law, which, by its very nature and constitution, is subject to amendment or repeal by the legislative power, constitutes and embodies the terms of the contract, if one exist at all. The contract, therefore, must, by its own inherent terms, be subject to this legislative control, unless the law contains an express inhibition creating an exemption from this liability. So important an immunity could not be derived from implication or presumption, in the absence of an express provision conferring it. The doctrine that the privileges and exemptions not common to individuals can not be acquired by corporations in the absence of express provisions conferring them, is applicable here, and too well settled to require repetition. It is, therefore, the rational presumption that if the legislature, which enacted this law, had intended to withdraw it from the control of future legislatures, if it had the power so to do, such an intention would have been manifested by an express inhibition of the right of amendment or repeal.

In England, where franchises, offices and dignities are said to be the subjects of private property, in which estates of inheritance and estates for life and for years are created, these privileges and immunities are still subject to the *incidental* and *implied* condition of legislative control by parliament.

695] *The constitution of the state under which this banking law was enacted contains the following in article eighth :

"Sec. 27. That every association of persons, when regularly formed within this state, and having given themselves a name, may, on application to the legislature, be entitled to receive letters of incorporation, to enable them to hold estates real and personal, for the support of their schools, academies, colleges, universities, and for other purposes."

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The constitution, by this provision, expressly authorized the granting of acts of incorporation, and prescribed the mode of doing it. Three things were required as preliminary steps to authorize it to be done. 1. An association of persons regularly formed. 2. A company name; and 3. An application to the legislature. These requirements of the constitution were conditions precedent to the exercise of the authority. It is true that the legislative power of the state is conferred on the general assembly in general terms; and it is said that the legislative power includes the authority to grant acts of incorporation. It is a settled rule of construction, however, that where any power is conferred, and a specific mode prescribed for its exercise, it can be exercised in no other manner than that provided. And all powers not expressly conferred are reserved by the people.

This general law, therefore, does not incorporate companies in the mode prescribed by the constitution, which, as it would appear, had in view the granting of special acts of incorporation to companies previously formed. In this constitutional mode provided, an organized company would have existed, with which the state authorities could have communicated in fixing the terms of the charter, and upon which the corporate privileges could have been conferred understandingly. But not so with this banking law. No company was already formed, which, "on application," was "entitled to receive letters of incorporation." This law simply prescribed the terms and mode for forming companies in future, and the privileges which they might exercise. The banking companies, therefore, existing under this law are not corporations constituted in strict conformity to the constitution of the state, and as such entitled to the common law incidents of corporations. It [696 is not claimed, however, that these companies are illegal; and I would not say that associations or collective bodies of men may not be legally constituted under the provisions of a general law, and receive from it the right to transact business, and to sue and be sued in their company name, to have perpetual succession, and indeed, many of the attributes of corporations. The joint stock banks in England, called into existence by the act of 7 Geo. IV, have been considered *quasi corporations* of this description. *Harrison v. Timmins*, 4 M. & S. 510; *Ang. & A. on Corp.* 22, 49. These companies being the mere creatures of the statute, however, can

at most be entitled to no rights or privileges beyond those strictly conferred by the statute.

In the interpretation of a statute, the several acts in *pari materia* are to be taken and comprised together in the construction of them, for the reason that they must be considered as having one object in view, and as acting upon one system. Mr. Smith, in his Commentaries on Statutory and Constitutional Construction, 750, 752, says:

"The whole system of legislation upon the subject may be taken into consideration, in order to aid in the construction of a statute relating to the same subject-matter; hence, other statutes in *pari materia*, whether they be repealed or unrepealed, may be considered." *Church v. Crocker*, 3 Mass. 21. It is equally well settled that every act of incorporation is subject to the provisions of all general laws relating to matters about which the charter is silent.

At the time of the enactment of this banking law, which was the 24th February, 1845, there existed a general statute entitled "An act instituting proceedings against corporations not possessing banking powers, and the visatorial powers of courts, and to provide for the regulation of corporations generally," passed March 7, 1842, which contained the following provision:

"Sec. 9. That the charter of every corporation of every description, whether possessing banking powers or not, that shall hereafter be granted by the legislature, shall be subject to alteration, suspension, or repeal, in the discretion of the legislature."

697] *As a matter of construction, it is perfectly clear that had the legislature intended to inhibit the right of amendment or repeal in relation to this banking law at the time of its enactment, either this provision in the general laws of the state would have been repealed, or an express provision inserted to create the exemption in regard to the banks which might be formed thereafter. And in the face of this glaring fact, the claim that this exemption can be derived by *implication* or *presumption* has no foundation in reason or common sense.

But independent of this matter of construction, which would seem to be incontrovertible, this bank law was, at the time of its enactment, subject to legislative control by this express provision in a general law of the state. It is true that this provision was repealed by the act of 12th of March, 1845, amendatory of the act relating to informations in the nature of *quo warranto*, etc. But

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the repeal was *prospective*, and could not have a *retroactive* operation. And the effect of this provision, be it observed, was not that every corporation hereafter formed, but that "the charter of every corporation that shall hereafter be granted by the legislature," shall be subject to this legislative control. Now, the charters of these banking companies were granted at the time of the enactment of the banking law, and became subject to this provision in an existing general law of the state; and the subsequent repeal of the provision had relation to the charters of corporations which might *thereafter* be granted, and not to those which had been previously granted and became subject to its terms.

The view here taken upon the first proposition is decisive of the case. But there is another aspect of this case presented by the second proposition.

2. Does the 60th section of the bank law of 1845 relative to taxation contain a material stipulation in a contract not subject to change or modification by the law-making power of the state?

*It is claimed that this provision constitutes an essential [698 part of the franchise of each bank existing under the authority of the law. Now, if a corporate franchise be not a contract or the subject-matter of a contract, and as such exempt from amendment or repeal, it follows as a legitimate conclusion that this provision does not contain the binding obligation of a contract withdrawing it from legislative control.

The subject of this provision is taxation, and the stipulation claimed to exist is that the prescribed mode and rate of taxation shall be observed as invariable during the entire period of the existence of each bank under the law. The question arises here, whether this provision of the law can, either in the *nature* of its *subject matter* or by its *terms*, be a stipulation in a contract which limits the legislative authority of the state in regard to the right of taxation.

The power of taxation is one of the most important attributes of sovereign authority inherent in government and essential to its existence. It is a high trust of civil power delegated for the common good, to be exercised even at the most critical periods and for the most important purposes, on the free exercise of which the *interest* certainly, and perhaps the *liberty*, of the whole community may depend. This prerogative of sovereignty, like the right of *eminent domain*, and the right of legislative control over existing

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laws by amendment and repeal, can not be impaired or arrested in its exercise in order to advance private or individual interests, but must remain at all times subservient to the great *object* and end of all civil government, the promotion of the *happiness* and *welfare* of the community. An attempt, therefore, on the part of the legislature to part with any portion of this power, or to restrain or abridge the exercise of its functions by contract, would be a violation of the high trust by which it was delegated, an abuse of sovereign authority liable to lead to consequences dangerous to the very existence of the government itself.

Not only is it an attribute inherent in the nature of the taxing power that its exercise must remain in unabridged subserviency to 699] the public welfare, but it is an essential requisite *in this trust of civil authority that its functions should be so exercised as to apportion the burdens of the government as far as practicable, with *equality* and *justice* to all the members of the community; and a law imposing unequal burdens of taxation, oppressing some to favor others, is an abuse of sovereign power and a violation of that high trust by which the power of taxation is delegated. This function of civil authority, vitally essential to the existence of the government, requires great delicacy and a high sense of justice in its exercise; and the abuse of it has led to difficulties, which in their consequences have subverted empires. It is important, therefore, that the true nature of the power of taxation, and the principle upon which it is delegated, should be maturely considered and well understood. A frequent recurrence to fundamental principles is enjoined by our bill of rights. A reference, therefore, to standard authority, for the true nature and foundation of the power of taxation, is not inappropriate.

Puffendorf's elementary work, chapter 9, of Book 7, contains the following:

"Since the subjects are obliged to the bearing of taxes and the like burdens on no other account but as they are necessary to defray the public expenses in war or peace, it is the duty of sovereigns in this respect to draw no further supplies than either the mere necessity or the signal benefit and interest of the state shall require. And then they are to see that these impositions be levied according to the justest proportion; and that no immunities or exemptions be granted to certain persons, to the defrauding or oppressing of the rest."

And I find the following in Rutherford's Institutes of Natural Law, 272, 273 :

"As it belongs to the legislative power of a civil society to direct the several members of it what they are to do for the common good, so it belongs to the same power to direct them likewise what they are to give for this purpose; that is, the power of raising money to answer the expenses which the society must make in its political capacity, or in pursuing the ends for which it was formed, is a branch of the legislative power.

"This right of the legislative power over the property of the subjects is not a right to take the whole, or, indeed, any part of it from them causelessly and arbitrarily. The preservation of each man's property is one of the ends which he proposed to himself in entering into civil society. But it is absurd to suppose that he would give up the whole of his property for the sake of preserving it. And the right which the society has, either over his person or over his property, is to be measured by what he may reasonably be presumed willing *to give up for the sake of obtaining those [700] ends which he proposed to himself in becoming a member of such society. Upon this account the burden of those payments which are called taxes, or duties and customs upon goods both movable and immovable, ought to be proportioned, as near as may be, to the value of each person's property; because the more a man's property is worth, the more he is naturally willing to pay for the security of it."

It is clearly an essential quality in the taxing power that its burdens be apportioned, as near as may be, to the value of each man's property; and that no *immunities or exceptions* be granted, favoring certain persons and thereby defrauding or oppressing the rest. A contract on the part of the government, to exempt one class of the community, either in whole or in part, from its just proportion of the burdens of taxation, would be repugnant to the true nature and essential character of this important civil power, an abuse of legislative authority, a violation of the fundamental principle, in regard to the public burdens, upon which alone persons become members of the community, and therefore of no binding obligation. It was said, by the supreme court of New Hampshire, in the case of *Brewster v. Hough*, 11 N. H. 138, that a law making such exemptions from taxation was valid until repealed. The enactment of a law may be a flagrant abuse of the legislative

power, and yet the law not absolutely void, but binding until repealed. But a contract to perpetuate this abuse of civil authority, by imposing a limitation on the legislative right of amendment or repeal, would clearly be void, and without any binding obligation. A law is void when it comes in conflict with some express constitutional provision, but a contract is void when illegal, or against public policy, or made without competent parties, or a competent subject-matter.

It is very true that, if we were governed by bare precedent without recurrence to first principles and the reason of the law, we might be led to a different conclusion. For, so far as bare precedent is concerned, it would appear to be as well settled by the decisions of the supreme court of the United States, and also by the state courts, that the taxing power may be parted with or abridged 701] by contract, as the *right of legislative control over acts of incorporation by amendment or repeal. They both rest upon the same ground; and, in either case, the claim is to limit or restrain the high functions of civil authority by contract, in order to advance mere private and individual interests.

The right of *taxation*, like the right of *eminent domain*, and the right of *amending and repealing existing laws*, is a branch of the legislative authority. Each of these high functions of the legislative power constitutes a *trust*—a most important *trust*—of civil authority, essential to the well-being of the community. Neither of them can be bartered off by the legislature, either in whole or in part, or in any manner abridged or restrained in its exercise by contract. But each, as an essential attribute of sovereignty, must remain in full and undiminished vigor, and be at all times subservient to the paramount object of all civil government—the *safety and welfare* of the people.

There is yet another aspect of this case, which is conclusive against the plaintiff:

On the supposition that the legislature is competent to perform the executive duty of making contracts, the question whether this particular provision constitutes a *material stipulation* in a contract, or a *simple rule of action*, prescribed by the law-making power, would be a matter of statutory construction. According to the well-settled rule of construction, public grants are to be strictly construed, and nothing to be derived from them by *implication and presumption*; and according to the doctrine of the supreme court

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of the United States, in the case of *The Providence Bank v. Billings*, the taxing power being vital and essential to the existence of the government, if it can be parted with to any extent by contract, will not be presumed or taken to be surrendered or abridged in any degree, in the absence of clearly expressed and positive provision to that effect.

The clause in this provision of the law, claimed to be evidence of the fact of a contract stipulation, is in these words: * "which sum or amount, so set off, shall be in lieu of all [702 taxes to which such company, or other stockholders thereof, on account of stock owned therein, would otherwise be subject."

At the time of the enactment of this banking law, there existed upon the statute book general laws imposing taxes upon banks and other corporations, to which the banks, under this law, would have been *otherwise* subject, and from the operation of which, *alone*, upon a strict construction, this provision created an exemption, was the taxation authorized and existing, to which such company, or the stockholders thereof, would otherwise have been subject.

This provision constitutes a part of a statute, is clothed in the language of a statute, is the proper subject-matter of a statute, and while it prescribes a rule of action, with a view to existing circumstances and laws, it is *prospective* in its operation, yet it contains no express provision or stipulation against such taxes as might thereafter be authorized and imposed; and no express inhibition against its subsequent amendment or repeal. Upon the application, therefore, of the rule of statutory construction, the surrender or abridgment either of the right of amendment or repeal, or of the power of taxation, is not to be taken by mere implication or presumption. In the case of *Gordon v. Appeal Tax Court*, 3 How. 133, and other cases, in which it has been held that the power of taxation might be surrendered or limited by legislation, there existed either a direct and express pledge of the public faith, or a direct, express, and unequivocal provision against the future or different exercise of the right of taxation. The application of this rule of construction is fortified by the consideration of the striking inequality and injustice of the rule of taxation here prescribed, as well as the utter want of any equivalent, either rendered or promised, on the part of any bank, for the surrender or limitation of a power so valuable and essential to the public interests. The acquisition of *such* a power, and in *such* a manner, by the *banks, would im- [703

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ply bad faith and corruption on the part of the legislature, and a reckless disregard of the public interests; a conclusion which courts, in their judicial action, would not be justified in finding by mere implication, at least, in the absence of express proof. Besides this, the legislative interpretation given to this proposition by subsequent enactments, and especially by the very act of 1851 which is in controversy, is conclusive on this question of statutory construction.

In each of *the views, therefore, presented by this case*, whether a *contract* within the meaning of the constitution be sought for in the general powers, privileges, and immunities of the bank, or in either the *nature* of the subject-matter, or the *special terms* of this particular provision of the banking law, the plaintiff must fail in the action.

Judgment for the defendant.

Mr. Justice Thurman did not sit in this case.

RANNEY, J. The claim to exemption from taxation, made under the act of 1845, raises the only question presented in this case.

The same question was made in the case of *Debolt v. The Ohio Life Insurance and Trust Company*, decided at the present term. I have there stated my views upon it, and, for the reasons there given, I freely concur in the judgment rendered in the case. Upon other questions alluded to in the opinion in this case, not necessarily involved in the inquiry, I prefer to wait until they have been fully discussed, and their decision shall become necessary, before expressing any opinion upon them.

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ACTION—

1. Covenant will lie on a penal bond with a condition for conveyance; the entire bond being declared on. *Taylor v. Browder*, 225.
2. Vendee may maintain an action against vendor, upon a title bond, to recover damages for a failure to convey, without restoring possession of the premises. *Ib.* 225.
3. A judgment can not be reversed on error because the form of action was misconceived, "in case the facts are substantially alleged which the party was bound to prove on the trial, in order to entitle him to a recovery." *Ib.* 225.
4. No action will lie by obligee against obligor on a bond, the consideration of which is a sale made by the former to the latter to defraud creditors; both of them having been guilty of the fraudulent intent. *Goudy v. Gebhart*, 262.
5. An action of assumpsit for use and occupation, or on the money counts, can not be maintained, where possession is held adversely under claim of title, and where no contract, express or implied, is shown. *Cincinnati v. Walls*, 222.
6. Action to recover money paid voluntarily can not be maintained. *Mays v. Cincinnati*, 268.
7. The right of contribution among sureties is founded, not in the contract of suretyship, but is the result of a general equity which equalizes burdens and benefits; and the common law, which has adopted and given effect to this equitable principle, by an action upon an implied assumpsit, only allows the action where there is a just and equitable ground for contribution. *Russell v. Faylor*, 327.
8. Where a surety has voluntarily paid money on a void note or obligation, he can not maintain an action against his co-surety for contribution. *Ib.* 327.
9. A wife, who by gross abuse of her husband has been driven beyond the pale of his protection, and a separation *de facto* exists, she living and maintaining herself as a single woman, and having had specific property decreed to her as alimony, may maintain an action at law in regard to such property without the joinder of her husband, although no divorce has been decreed. *Benadum v. Pratt*, 403.

ACQUIESCENCE. See TRUSTS AND TRUSTEES, 8, 9.

ADMINISTRATORS AND EXECUTORS. See ASSETS, 1

ADVANCEMENT—

1. Where a person purchases property with his own funds, and places the title in the name of a member of his own family, the legal presumption is that the property is intended as a gift or advancement. *Creed v. Lancaster Bank*, 1.
2. Subsequent insolvency of donor will not avoid such gift. It must be shown that an intention to defraud future creditors existed in the mind of the donor at the time the gift was made, to justify the court in setting it aside. *Ib.* 1.

AFFIDAVIT—

1. The affidavit of a party to a suit may be received to prove the loss of a writing, in order to let in secondary evidence of its contents. *Wells v. Martin*, 386.

Affidavit—Appeal.

APPEAL—Continued.

2. The fact of loss is to be established to the satisfaction of the court, not conclusively, for that is not required, but reasonably. To do this may, in some cases, where there is more than one party on the side offering the testimony, require the affidavits of all of them. In other cases, an affidavit of one of them may be sufficient. No general rule can be laid down upon the subject. The ruling must depend upon the circumstances of each case. *Ib.* 386.

AGENT. See **PRINCIPAL AND AGENT**

AGREEMENT. See **CONTRACT**, 3, 8.

ALIMONY—

- A wife, who by gross abuse of her husband has been driven beyond the pale of his protection, and a separation *de facto* exists, she living and maintaining herself as a single woman, and having had specific property decreed to her as alimony, may maintain an action at law in regard to such property, without the joinder of her husband, although no divorce has been decreed. *Benadum v. Pratt*, 403.

APPEAL—

1. The law making it the duty of the court of common pleas, at the time of the rendition of the judgment or decree, in certain cases, to ascertain and fix the penalty of the appeal bond to be given in the event of an appeal, requires this act to be performed by that court without the motion of either party in the cause. *Hubble v. Renick*, 171.
2. The omission of the court of common pleas to do this act will not deprive a party of his appeal, when he has, by giving notice and executing an appeal bond, done all upon his own part which the law requires to entitle him to the appeal. *Ib.* 171.
3. In case of this omission by the common pleas, the appellant should give bond, with security, to the approval of the clerk of the court, or one of the judges thereof. And if the appeal bond should be found insufficient or defective, the district court can order another bond to be given. *Ib.* 171.
4. A motion to dismiss an appeal will be in time if made during the term at which the appeal is entered, and before the judgment. *Ib.* 171.
5. Where the claim of a complainant in a chancery proceeding against several defendants is separate and distinct, so that the case can be tried as to one or more of the defendants without interfering with the rights or liabilities of the other defendants, it is competent for a court of chancery to pass on the case and render a separate decree as to such defendants, and such decree may be appealed from, although the rest of the case may be undisposed of in the court below. *Dougherty v. Walters*, 201.
6. An appeal of one branch of a case will not bring into the appellate court parties whose cause has not been adjudicated in the court below, although such parties would be necessary in the appellate court, to enable it to render a decree. *Ib.* 201.
7. Where the court of common pleas proceeds to render a decree as to one of several defendants, whose interests are inseparably connected, leaving the case as to such other defendants undisposed of, such decree is, so far as the right of appeal is concerned, a nullity, and can be set aside by the court rendering the decree, at a subsequent term, for irregularity. *Ib.* 201.
8. To authorize the district court to reserve a cause, and send it to the supreme court for decision, on account of the character of the questions which arise in the case, the questions should be such as require the decision of the court of dernier resort, and not such as are well settled and of familiar application. *Jenkins v. Pearson*, 381.
9. An appeal from a final decree opens up the whole merits of the cause for investigation, which were involved in, or connected with the subject-matter of such decree. *Teaff v. Hewett*, 511.

Appeal—Assets.

APPEAL—Continued.

10. The appellate jurisdiction of the supreme court extends only to the judgments and decrees of courts created and organized in pursuance of the provisions of the constitution. *Logan Branch Bank, Ex parte*, 432.
11. The appeal from the decision of the Auditor of State, provided for in the 74th section of the act of April 13, 1852, "For the assessment and taxation of all property in this state," etc., is in conflict with the provisions of the constitution, from which the jurisdiction of the court is derived, and can not therefore be had. *Ib.* 432.
12. An appeal may be taken from the common pleas to the district court under the "Act to regulate appeals to the district court," from any final judgment or decree, rendered in a civil cause, in which the court of common pleas had original jurisdiction, whether the action is given by statute or existed at common law. *Knoup v. Piqua Bank*, 603.

ARBITRATION—

1. A court of chancery will not decree a specific performance of an agreement to arbitrate, nor will it require arbitrators to make an award. *Conner v. Drake*, 166.
2. Parties, by agreement, can not change the mode of proceeding in the trial of a cause in court; but each party has a right to demand that the cause shall be tried in the ordinary way, although he may previously have entered into an agreement that certain questions arising in the controversy should be submitted to arbitration. *Ib.* 166.
3. Where a question of damages arises it is not error in the court, by the consent of both parties, to permit the amount to be fixed by arbitrators, and to decree the amount thus found. *Ib.* 166.
4. A party to a statutory arbitration, on a motion for judgment on the award, is not imperatively required by the statute to prove the execution of the submission or arbitration bond, but such proof may be waived by the adversary. *Commissioners v. Carey*, 463.
5. The act authorizing and regulating arbitrations requires that causes of objection to judgment upon the award must be made to appear, on oath or affirmation, at the term of the court to which the submission and award are filed. *Ib.* 463.
6. After the party has interposed his objections, and the litigation thereon has been carried to the court of last resort and decided, it is too late to offer new causes why judgment should not be entered upon the award. *Ib.* 463.
7. In an arbitration under our statute, after the arbitrators have been sworn, and the proofs and arguments of the parties have been fully submitted to them, and they have retired for consultation and agreed upon the award, the submission can not be revoked by one party, although the award has not in fact been signed by the arbitrators and delivered to the parties. *Ib.* 463.

ASSETS—

1. The representatives of an estate may be so situated with reference to interests sought to be converted into assets, that the creditor may invoke the aid of a court of equity to control such interests, and place them into the hands of such representatives to be administered; but equity will go no further, and leave the settlement of the estate to the probate court. *McDonald v. Aten*, 293.
2. Where the dower interest of a widow, in property sought to be converted into assets, is manifest, it will be protected, although she may not have filed an answer. *Ib.* 293.
3. Upon the decease of a debtor, his estate, real and personal, by law, stands for the payment of his general creditors alike, and one creditor can not, by superior diligence, acquire a superior right to such estate. *Ib.* 293.

Assets—Bail.

ASSETS—Continued.

4. Shares in railroad companies are personal property, whether the companies are or are not subject to the provisions of the "act regulating railroad companies," passed February 11, 1848. *Johns v. Johns*, 350.

ASSIGNMENTS—

By debtor to creditor.

See **DEBTOR AND CREDITOR**, 1, 5.

1. By the provisions of the "act to incorporate the State Bank of Ohio, and other banking companies" (43 Ohio L. 24), a bank holds a lien on the shares of its stockholder for the amount of his indebtedness to it, which can not be defeated by a transfer made without the consent of a majority of the directors, nor will such consent authorize a transfer if the debt is overdue and unpaid. *Conant v. Seneca Co. Bank*, 298.
2. Although an assignment on the books of the bank may be necessary to pass a legal title to stock, yet an equitable title may be otherwise conveyed; and the bank is bound to respect such equity from the time it receives notice of it. Hence, debts contracted by the assignor to the bank, after the receipt of such notice, are not, as against the assignee, liens upon the stock. *Ib.* 298.
3. Notice of such assignment to the cashier is notice to the bank. *Ib.* 298.
4. If a debtor make an assignment to pay debts, some of which are usurious, no beneficiary of the trust who comes in under it can object to the payment of such usurious debts. *Busby v. Finn*, 409.

ASSIGNMENT OF ERRORS—

1. Where no assignment of errors is filed, the judgment may be affirmed for that reason. *Wells v. Martin*, 386.
2. A plaintiff will not be permitted to allege errors, *viva voce*, at the hearing, which he has not assigned. *Ib.* 386.

ASSUMPSIT—

1. An action of assumpsit for use and occupation, or on the money counts, can not be maintained where possession is held adversely under claim of title, and where no contract, express or implied, is shown. *Cincinnati v. Walls*, 222.
2. Assumpsit does not lie to recover bank money paid voluntarily. *Mays v. Cincinnati*, 268.
3. The right of contribution among sureties is founded, not in the contract of suretyship, but is the result of a general equity which equalizes burdens and benefits; and the common law, which has adopted and given effect to this equitable principle, by an action upon an implied assumpsit, only allows the action where there is a just and equitable ground for contribution. *Russell v. Failor*, 327.
4. Where a surety has voluntarily paid money on a void note or obligation, he can not maintain an action against his co-surety for contribution. *Ib.* 327.

ATTORNEY'S FEES—

When a debtor voluntarily pays the collection fees of the creditor's attorney, and no part of them is retained by the creditor, but they all go to the attorney, and the transaction is not a shift to obtain usurious interest, a note subsequently given by a surety of the debtor for a balance of the debt remaining due is not void for usury. *Busby v. Finn*, 409.

AWARD—

A court of chancery will not decree a specific performance of an agreement to arbitrate, nor will it require arbitrators to make an award. *Conner v. Drake*, 166.

BAIL. See SURETY.

Bailment—Banks.

BAILMENT—

1. In case of a regular deposit of wheat with a warehouseman, which requires of the depositary the use of ordinary diligence in taking care of the wheat, and a redelivery of the same, on demand, to the depositor, on being paid a reasonable compensation for his services, the warehouseman would be liable to the depositor for the value of the wheat in case he mixes it with other wheat in his warehouse, and ships the same for sale on his own account notwithstanding he may supply the place of the depositor's wheat by other wheat procured and deposited in his warehouse; and the destruction by accident of the warehouse, and the wheat supplied to take the place of the depositor's wheat, will not protect the warehouseman from liability to the owner. *Chase v. Washburn*, 244.
2. In case of an irregular deposit or mutuum, where the obligation imposed upon the depositary or mutuary is to redeliver, not the specific thing furnished, but another article of the same kind and value; or where the depositary has the *option* to return the *specific article* received, or another of the *same kind and value*, in either case the property passes to the depositary as fully as in a case of ordinary sale or exchange; and the risk of loss by accident follows the control or dominion over the property. *Ib.* 244.
3. Where a warehouseman receives wheat, and by the consent of the owner, or in accordance with the custom of the trade, mixes the wheat in a common mass with the other wheat in his warehouse, and with the understanding that he is to retain or ship the same for sale on his own account, at pleasure, and, on presentation of the warehouse receipt, is either to pay the market price thereof in money, or redeliver the wheat, or other wheat in place of it; the transaction is not a bailment, but a sale, and the property passes to the depositary, and carries with it the risk of loss by accident. *b.* 244.

BANKS—

1. Mere irregularities in organizing a corporation will not deprive the officers and stockholders of the protection of the charter, or subject them to private liability, when sued as unauthorized bankers, under the act of 1816. *Bartholomew v. Bentley*, 37.
2. But such organization, to protect them, must be *substantially* in accordance with the charter. *Ib.* 37.
3. Directors of a bank, elected in 1822, the bank being entirely insolvent and performing no corporate acts from that time until 1838, will not be held to have continued in office until the latter period, although the charter provided that they should continue in office until their successors were elected. On the contrary, so long a suspension from the performance of any official duty will be regarded as an abandonment or resignation of the office. *Ib.* 37.
4. The act of such persons in appointing directors to fill vacancies in the board is entirely void, although the charter provided that a part of the directors of the bank might fill such vacancies. *Ib.* 37.
5. Where the charter provided that stockholders only should be elected directors, persons having no interest in the stock, but fraudulently and collusively receiving the transfer of a share to qualify them, are not eligible. *Ib.* 37.
6. When the directors and legally constituted agents of a corporation have, for many years, acquiesced in a subscription to stock, made by a person in the names of his children or others, who have exercised acts of ownership over the stock, and voted upon it, without objection, as their own, the corporation will not afterward be allowed to treat the subscription as if it were a fraudulent use, by the original subscriber, of mere names, to secure a greater number of votes than he would be entitled to under the by-laws if the stock had stood in his own name. *Creed v. Lancaster Bank*, 1.

Banks.

BANKS—Continued.

7. A note or other obligation taken by a bank limited by its charter to six per centum interest upon its loans, is void, if more than that is reserved or paid, for want of corporate power to enter into such contract. *Stevens v. Bank of Wooster*, 233.
8. Such defense may be made to a suit brought to enforce such contract in equity as well as at law. *Ib.* 233.
9. Stockholder competent as witness in a cause to which the bank is party, by force of act to improve the law of evidence. *Lawson v. Salem Bank*, 206.
10. By the provisions of the "act to incorporate the State Bank of Ohio, and other banking companies" (43 Ohio L. 24), a bank holds a lien on the shares of its stockholder for the amount of his indebtedness to it, which can not be defeated by a transfer made without the consent of a majority of the directors, nor will such consent authorize a transfer if the debt is overdue and unpaid. *Conant v. Seneca County Bank*, 298.
11. Although an assignment on the books of the bank may be necessary to pass a legal title to stock, yet an equitable title may be otherwise conveyed; and the bank is bound to respect such equity from the time it receives notice of it. Hence, debts contracted by the assignor to the bank, after the receipt of such notice, are not, as against the assignee, liens upon the stock. *Ib.* 298.
12. Notice of such assignment to the cashier is notice to the bank. *Ib.* 298.
13. Where a person holds a full and perfect equitable title to stock, of which the bank has notice, he is also entitled in equity to the dividends thereafter accruing upon it. *Ib.* 298.
14. It is a violation of said act for one of the independent banks chartered by it to make loans to a director, before the adoption, by the stockholders, of by-laws to regulate the liabilities of directors; and such violation may be a cause of forfeiture of the charter, and will render each director who knowingly participates in or assents to the same, individually liable for all damages which the company, its shareholders, or any other persons, body politic or corporate, shall have sustained in consequence of such violation. But the court are not prepared to say that no debt is created by such a loan. *Ib.* 298.
15. A note or other obligation taken by a bank, limited by its charter to six per centum interest on its loans, is void, if more is reserved or taken, not only upon general principles, for the want of corporate power to enter into such contract, but by the express provisions of the sixty-first section of the act to incorporate the State Bank. *Preble County Bank v. Russell*, 313.
16. The ninth section of the act of February 24, 1848 (46 Ohio L. 91), suspended the right to make such defense, but allowed an action against the bank to recover the money for the use of schools. The repeal of this law in 1850 restored the right to defend. *Ib.* 313.
17. The law of 1848 only operated upon the remedy, still leaving the contract void and expressly forfeited; and consequently its subsequent repeal, and the revival of the right to defend, did not in any manner affect or impair any provision of a valid contract. *Ib.* 313.
18. The Bank of Norwalk was restricted by its charter to six per centum per annum, in advance upon its loans; any contract upon which it knowingly took interest at a greater rate was void; it had no right to take interest under the name of attorney's fees for collection, and a mistake of law upon its part would not exempt it from the consequences of taking illegal interest. *Bushy v. Finn*, 209.
19. But an error in calculation, an accidental omission of a credit, or a transfer, by mistake, of an item from one account to another, will not make a security usurious and void, there being no intent to exact or take unlawful interest. *Ib.* 209.

Banks.

BANKS—*Continued.*

20. The legislature will not be considered as having undertaken to surrender the taxing power of the state, in the absence of express words to that effect. *Knoup v. Piqua Branch Bank*, 603.
21. *Obiter.* That every organization clothed with authority to make currency is a public institution, performing a public function, exercising public power, and always subject to public control. *Ib.* 603.
22. A tax, regularly assessed under the act of March 21, 1851, to tax banks, and bank and other stocks, the same as other property, is not remitted by the repealing clause of the act of April 13, 1852, for the assessment and taxation of all property in this state, and for levying taxes thereon according to its true value in money. *Debolt v. Trust Company*, 563.
23. The remedy, by bill in chancery, provided by the first-named act, for the collection of taxes assessed against the Ohio Life Insurance and Trust Company, and re-enacted in the last, may be resorted to for the collection of taxes assessed in 1851, and remaining unpaid after the passage of the act of 1852. *Ib.* 563.
24. The sixtieth section of the act of February 24, 1845, to incorporate the State Bank of Ohio, and other banking companies, contains no pledge on the part of the state not to alter or change the mode or amount of taxation therein specified; but the taxing power of the general assembly over the property of companies formed under that act remains the same as over the property of individuals. *Ib.* 563.
25. But, if it had contained such pledge, involving a surrender of the right of taxation, it would be inoperative for want of constitutional power in the general assembly to make it. *Ib.* 563.
26. This right, vital to the existence of every government, and one of the most important incidents of sovereignty, has only been delegated to the general assembly to be used for the purpose of accomplishing the lawful objects with which it is charged. *Ib.* 563.
27. It can only be exercised to raise money for these purposes; and any attempt to use it otherwise, or to control or abridge the *right itself*, is beyond the delegation, and an unauthorized assumption of power. *Ib.* 563.
28. No control over its exercise has been conferred upon the federal government by article 1, section 10, of the Constitution of the United States, prohibiting the states from passing laws impairing the obligation of contracts, or by any other clause of that instrument. *Ib.* 563.
29. The act of March 21, 1851, impairs no right of any banking company organized under the act of February 24, 1845, and is a valid and constitutional law. *Debolt v. Trust Company*, 563.
30. A d restraint by a treasurer against the money and property of an incorporated bank, for taxes assessed against it under the act of March 21, 1851, can not be enjoined in chancery. *M. and T. Bank v. Debolt*, 591.
31. An ordinary charter is not a contract, within the meaning of the prohibition of section 10 of article 1 of the Constitution of the United States. *Ib.* 591.
32. The charter of a private corporation is in form, and in its inherent terms and nature, a law, and does not possess the essential elements of a contract, to-wit. *Bank of Toledo v. Bond*, 622.
33. The act entitled "An act to incorporate the State Bank of Ohio and other banking companies," passed February 24, 1845, is a public and general law of the state, and not a contract, either in form or substance; and the essential elements of a contract are not to be found either in the law, taken entire, or any special provision of it, within the operation of the prohibitory clause of the Constitution of the United States. *Ib.* 622.
34. While the government is bound in *good faith* to protect and keep inviolate

Banks—Bills of Exception.

BANKS—Continued.

the contracts made, and rights of private property vested under the authority and regulations of the charters of private corporations, in common with all other private property, as one of the sacred and primary objects of all civil government; yet such contracts are made, and property vested subject to the implied condition that the legislative power of the state remains undiminished in any manner, and always subject to be exercised whenever the paramount object of its creation, the public welfare, shall require it. *Ib.* 622.

BEQUEST. See **WILLS.**

BILL IN EQUITY. See **EQUITY; PLEADING; PRACTICE.**

BILL OF REVIEW. See this title under **EQUITY.**

BILL OF EXCHANGE—

1. The words, "I hereby give J. W. Abell the liberty of making use of my name, if it will be of use to him with his friends in Connecticut, to the amount of one thousand or fifteen hundred dollars, to borrow money. N. W. Palmer," are not a mere guaranty for the amount named, but confer a power upon J. W. Abell to sign the name of Palmer to a note for the money borrowed. *Palmer v. Yarrington*, 253.
2. The validity of a note given in Connecticut is to be determined by the laws of that state, under which any contract reserving more than six per centum interest per annum is absolutely void. *Ib.* 253.
3. The holder of a bill of exchange, in order to charge an indorser residing in another state or place, adopting the mail as the means of conveying the notice of the dishonor of the bill, *may* send the notice by the mail of the day of default, but if not, he *must* deposit the notice, directed to the indorser, in the post office, in time to be sent by the mail of the day next after the day of the dishonor, unless the mail of that day be made up and closed at an unreasonably early hour, or, in other words, before early business hours; and if there be no mail of that day, or the mail of that day be closed at an unreasonably early hour, then by the next practicable mail. *Lawson v. Salem Bank*, 206.
4. Where a bill was protested in the city of Pittsburgh, on the 27th of July, and the departure of the only mail of the next day to the place of the residence of the indorser was ten o'clock, A. M., the time of the closing of the mail being ten minutes after nine o'clock, and not before convenient early business hours, the holder does not use due diligence if he neglects to send the notice of dishonor by that mail. *Ib.* 206.
5. The holder of a bill is not bound to give notice of the dishonor to any more than his first immediate indorser. And each party to a bill has the same time for giving notice to parties prior to him that the holder has. *Ib.* 206.
6. After an agent, to whom a bill is sent for collection, has given notice to the principal, the same time thereafter is allowed to the principal for giving notice to the indorser as if he had himself been an indorser receiving notice from the holder. *Ib.* 206.
7. A bill, note, or bond taken by a bank limited by its charter to six per centum interest on its loans, is void if more is reserved or taken, not only upon general principles for the want of corporate power to enter into such contract, but by the express provisions of the act to incorporate the State Bank. *Preble County Bank v. Russell*, 313.

BILLS OF EXCEPTION—

1. Where the court of common pleas erred in ruling as to a material fact in the defense, and the bill of exceptions does not profess to show all the evidence, so as to enable this court to ascertain that the defendants were not prejudiced by such erroneous ruling, a judgment against the defendants will be reversed. *Baldwin v. Bank of Marillon*, 141.

Bills of Exception—Cases Explained, etc.

BILLS OF EXCEPTION.—*Continued.*

2. An exception to the judgment of a court below ruling out evidence, can not be considered, unless such evidence is spread upon the record. *Palmer v. Yarrington*, 253.
3. Papers not set out in, or attached to the bill of exceptions, or in some way so connected therewith as to make them a part thereof, can not be taken as parts of the bill. *Wells v. Martin*, 386.
4. To make a paper a part of a bill of exceptions it must be incorporated in it, or attached to it, or filed with it, and so described as to leave no doubt of its identity. When not so made a part of the bill, the defect is not cured by a journal entry directing it to be taken as a part thereof. *Busby v. Finn*, 409.
5. A bill of exceptions must be signed and sealed at the term at which the exception is taken, and it can not be amended after that term. A *nunc pro tunc* order made at a subsequent term to the effect that a paper not identified by the bill shall be considered as a part of it, is a nullity. *Id.* 409.

BOND—

1. Vendee may maintain an action against vendor, upon a title bond, to recover damages for a failure to convey, without restoring possession of the premises. *Taylor v. Browder*, 225.
2. Covenant will lie on a penal bond with a condition for a conveyance; the entire bond being declared on. *Id.* 225.
3. No action will lie by obligee against obligor on a bond, the consideration of which is a sale made by the former to the latter to defraud creditors; both of them having been guilty of the fraudulent intent. *Goudy v. Gehhart*, 262.
4. In such a case, the proof of the fraud may come from the defendant. The rule is, that no one is allowed to set up his own iniquity to defeat an innocent person. But where the parties are *particeps criminis*, the fraud may be proved by the defendant. *Id.* 262.
5. The contract of a surety upon an injunction bond is within the statute of frauds, and to be strictly construed, and no parol evidence is admissible to add to, vary, or contradict it in any of its terms. *Williamson's Adm'r v. Hall*, 190.
6. The law making it the duty of the court of common pleas, at the time of the rendition of the judgment or decree, in certain cases, to ascertain and fix the penalty of the appeal bond to be given in the event of an appeal, requires this act to be performed by that court without the motion of either party in the cause. *Hubble v. Renick*, 171.
7. The omission of the court of common pleas to do this act will not deprive a party of his appeal, when he has, by giving notice and executing an appeal bond, done all upon his own part which the law requires to entitle him to the appeal. *Id.* 171.
8. In case of this omission by the common pleas, the appellant should give his bond, with security, to the approval of the clerk of the court, or one of the judges thereof. And if the appeal bond should be found insufficient or defective, the district court can order another bond to be given. *Id.* 171.

BUILDINGS. See PUBLIC BUILDINGS.

CASES, EXPLAINED, AFFIRMED, DOUBTED, OVERRULED—

1. *Ludlow v. Kidd*, 1 Ohio, 381; *Hey v. Stevens*, 15 Ohio. Practice on bills of review. Disapproved by Caldwell, C. J. *Creed v. Lancaster Bank*, 1.
2. *Mitchell v. Gazzam*, 12 Ohio, 315. Assignments. Insolvency. Disapproved. *Doremus v. O'Harra*, 45; *Atkinson v. Tomlinson*, 237.
3. *Buckley v. Gilmore*, 12 Ohio, 75. Approved. *Tracey v. Sacket*, 54.
4. *Glick v. Gregg*. Construction of occupying claimant law. Overruled. *Beardsley v. Chapman*, 118.

Cases Explained, etc.—Charter.

CASES EXPLAINED, ETC.—*Continued.*

5. *McGovney v. The State*, 20 Ohio, 13. Bond. Obligation of surety. Affirmed and distinguished from. *Williamson's Adm'r v. Hall*, 190.
6. *Johnson v. Bentley*, 15 Ohio, 91. Commented upon and affirmed. *Kearney v. Buttes*, 362.
7. *Miles v. Foster*, 10 Ohio, 1. Legal estate granted to trustees without words of perpetuity upon trusts of perpetual duration. Doubted. *Williams v. First Presbyterian Society*, 478.
8. *Ohio v. Commercial Bank of Cincinnati*, 7 Ohio, 223. Charter. Limitation of taxing power. Overruled. *Bank of Toledo v. Bond*, 622. See also, *Debolt v. Trust Company*, 563.

CERTIORARI—

1. The supreme court may review on certiorari the decision of an inferior court on a motion to set aside the verdict of a jury under the act for relief of occupying claimants, though the motion was based on matter of fact—the testimony being set out in the bill of exceptions. *Beardsley v. Chapman*, 118.
2. A writ of certiorari does not lie to review the order of a court of equity, overruling exceptions to testimony. *Galloway v. Stopkiet*, 434.

CESTUI QUE TRUST. See TRUSTS AND TRUSTEES, 10, 11.

CHANCERY. See EQUITY.

CHARITABLE USE. See that title under EQUITY.

CHARGE OF COURT—

1. In a criminal, as well as in a civil case, the judgment will not be reversed for a misdirection of the court to the jury on an abstract question of law that could not arise upon the testimony, or influence the decision of the jury. *Stewart v. The State*, 66.
2. When a court has charged a jury upon a point, and afterward an instruction is prayed, which, in substance, is the same as the charge given, it is not error to decline giving it on the ground that the court has already charged on that point. *Id.* 66.
3. Where the court of common pleas declined to charge the jury as requested by the defendant, in regard to a matter in which the compliance of the court with the request could not have aided the defense, such refusal of the court constitutes no ground of error for the reversal of the judgment. *Chase v. Washburn*, 244.
4. Where the court of common pleas erred in ruling as to a material fact in the defense, and the bill of exceptions does not profess to show all the evidence, so as to enable this court to ascertain that the defendants were not prejudiced by such erroneous ruling, a judgment against the defendants will be reversed. *Baldwin v. Bank of Massillon*, 141.

CHARTER—

1. It is a violation of the act to incorporate the State Bank of Ohio and other banking companies, for one of the independent banks created by it to make loans to a director, before the adoption, by the stockholders, of by-laws to regulate the liabilities of directors; and such violation may be a cause of forfeiture of the charter, and will render each director, who knowingly participates in, or assents to the same, individually liable for all damages which the company, its shareholders, or any other persons, body politic or corporate, shall have sustained in consequence of such a violation. *Conant v. Seneca Co. Bank*, 298.
2. The 60th section of the act of February 24, 1845, to incorporate the State Bank of Ohio and other banking companies, contains no pledge on the part of the state not to alter or change the mode or amount of taxation therein specified; but the taxing power of the general assembly over the property of companies formed under that act, remains the same as over the property of individuals. *Debolt v. Trust Company*, 563.

 Charter—Cincinnati.

CHARTER—Continued.

3. An ordinary charter is not a contract, within the meaning of the prohibition of the 10th section of the 1st article of the Constitution of the United States. *Mechanics' and Traders' Bank v. Deboit*, 591.
4. The charter of a private corporation is in form, and in its inherent terms and nature, a law, and does not possess the essential elements of a contract, to-wit: two competent contracting parties, a proper subject-matter, a legal consideration, and a mutuality of obligation; and, therefore, does not come within the purview and true intent of the clause of the Constitution of the United States, which prohibits a state from passing any law impairing the obligation of a contract. *Bank of Toledo v. Bond*, 622.
5. The act entitled "An act to incorporate the State Bank of Ohio and other banking companies," passed February 24, 1845, is a public and general law of the state, and not a contract, either in form or substance; and the essential elements of a contract are not to be found either in the law, taken entire, or any special provision of it, within the operation of the prohibitory clause of the Constitution of the United States. *Ib.* 622.

CHATTELS—

The machinery in a woollen factory, consisting of carding machines, spinning machines, power looms, etc., connected with the motive power of the steam engine by bands and straps, but in no wise attached to the building in which used, except by cleats, or other means to confine them to their proper places for use, and subject to removal whenever convenience or business may require without injury, are not fixtures, but chattel property. *Teaff v. Hewitt*, 541.

See **FIXTURES**.

CINCINNATI—

1. The ordinance of the city of Cincinnati of May 5, 1827, regulating wharfage, made no provision for wharfage from ferry-boats. *Cincinnati v. Walls*, 222.
2. The defendant having been for a long time in the adverse possession of a ferry-landing in said city, and receiving rents therefor, is not liable to the city for such receipts until the right of the city to such landing is established by a proper proceeding for that purpose. *Ib.* 222.
3. By the 9th section of the charter of the city of Cincinnati, the city council were required to establish and regulate the markets and market-places for the sale of provisions, etc. An amendatory act prohibited them from assessing any charge upon persons bringing provisions to the markets in wagons, etc., but allowed them to prevent huckstering and forestalling. *Mays v. Cincinnati*, 268.
4. An ordinance of the city defining a huckster to be "any person, not a farmer or butcher, who should sell, or offer for sale, any commodity not of his own produce or manufacture," and subjecting such person to a penalty, unless he had previously obtained license and paid therefor a sum fixed by council, is in conflict with said amendatory act, and void. *Ib.* 268.
5. It was not in the power of the council, by ordinance, to include persons as hucksters who did not fall within the ordinary meaning of that term. *Ib.* 268.
6. The power of taxation upon employment, not being conferred by the city charter, can not be exercised as a means for the prevention of huckstering. *Ib.* 268.
7. The power of taxation, being a sovereign power, can only be exercised by the general assembly when and as conferred by the constitution, and by municipal corporations only when unequivocally delegated to them by the legislative body. *Ib.* 268.
8. The sum demanded for license to pursue an employment, when used as a means of supplying the public treasury, is a tax on such employment. *Ib.* 268.

Cincinnati—Constitutional Law.

CINCINNATI—*Continued.*

9. The city council of Cincinnati have no power to levy such a tax. *Ib.* 268.

CITIES. See COUNCIL; CINCINNATI; CLEVELAND.

CLEVELAND—

Under the charter of the city of Cleveland (which was divided into three wards), a council was elected on the 4th of March, 1850, to serve for one year, consisting of three aldermen, elected at large, and three councilmen in each ward, who were required to "reside therein." On the 22d of that month the legislature amended the charter, dividing the city into four wards, and reducing the number of councilmen to two in each ward. By this division, some of the councilmen were thrown out of the wards for which they were elected. This amendment made no provision for an election under it, until the next year, nor did it provide when it should take effect.

1. The amendatory law had no effect upon the council then elected. The effect of its provisions dividing the city into wards for election purposes must be postponed until they could be called into requisition in future elections. *Scovill v. Cleveland*, 126.
2. If this were otherwise, yet while the members of the council continued to act *de facto* their proceedings would be valid. *Ib.* 126.
3. Under the ninth section of the city charter, providing for the improvement of streets, etc., by a discriminating tax to be levied upon ground bounding on such streets, the committee of estimate and assessment need not be appointed before adopting the ordinance for its construction. *Ib.* 126.
4. A want of legal notice to claimants of damages arising from the construction of such improvement, can not be set up by one not having any such claim. *Ib.* 126.
5. Such assessment, under said section, need not be levied upon all the lands on such street, but only upon those bounding upon the improvement or "near thereto." *Ib.* 126.
6. It is no objection to such assessment that it exceeded the actual expense of the work, provided it was in accordance with the estimate, made in good faith. *Ib.* 126.
7. Such discriminating assessment for that purpose, laid upon grounds immediately benefited in proportion to such benefit, was a legitimate exercise of the taxing power under the constitution of 1802; nor is the same opposed to section 4, article 8, of that instrument, providing for the inviolability of private contracts. *Ib.* 126.

COMMISSIONERS OF COUNTY—

1. The right to determine when a court-house, jail, and public offices shall be erected by a county, is vested in its commissioners. They must provide a court-room, jail, and offices; but they need not be buildings erected expressly for the purpose. *Ex parte Black*, 30.
2. The act of January 28, 1851, does not limit the discretion of the commissioners of Hamilton county in these particulars. *Ib.* 30.
3. Subscriptions by commissioners to capital stock of railway companies under constitution of 1802. *C. W. & Z. R. R. v. Comm'rs of Clinton Co.*, 77.

CONSTITUTIONAL LAW—

1. It is the right and duty of the judicial tribunals to determine whether a legislative act drawn in question in a suit pending before them is opposed to the Constitution of the United States, or of this state, and, if so found, to treat it as a nullity. *C. W. & Z. R. R. v. Comm'rs of Clinton Co.*, 77.
2. In such case the presumption is always in favor of the validity of the law; and it is only when manifest assumption of authority and a clear incom-

Constitutional Law.

CONSTITUTIONAL LAW—*Continued.*

- patibility between the constitution and the law appear, that the judicial power will refuse to execute it. *Ib.* 77.
3. The general assembly, like the other departments of government, exercises only delegated authority; and any act passed by it not falling fairly within the scope of "legislative authority," is as clearly void as though expressly prohibited. *Ib.* 77.
 4. The power of the general assembly to pass laws can not be delegated by them to any other body or to the people. *Ib.* 77.
 5. Subscriptions by municipal corporations to the capital stock of railroad companies, not in contravention with the constitution of 1802. *Ib.* 77, *Loomis v. Spencer*, 153.
 6. A discriminating assessment for the improvement of streets, laid upon grounds immediately benefited in proportion to such benefit, was a legitimate exercise of the taxing power under the constitution of 1802; nor is the same opposed to section 4, article 8, of that instrument, providing for the inviolability of private contracts. *Scovill v. Cleveland*, 126.
 7. The power of taxation, being a sovereign power, can only be exercised by the general assembly when, and as conferred by, the constitution; and by municipal corporations only when unequivocally delegated to them by the legislative body. *Mays v. Cincinnati*, 268.
 8. An act or charter involving a surrender of the right of taxation, would be inoperative for want of constitutional power in the general assembly to make it. *Debolt v. Trust Company*, 543.
 9. This right, vital to the existence of every government, and one of the most important incidents of sovereignty, has only been delegated to the general assembly *to be used* for the purpose of accomplishing the lawful objects with which it is charged. *Ib.* 563.
 10. It can only be exercised to raise money for these purposes; and any attempt to use it otherwise, or to control or abridge the *right itself*, is beyond the delegation, and an unauthorized assumption of power. *Ib.* 563.
 11. No control over its exercise has been conferred upon the federal government by article 1, section 10, of the Constitution of the United States, prohibiting the states from passing laws impairing the obligation of contracts, or by any other clause of that instrument. *Ib.* 563.
 12. An ordinary charter is not a contract, within the meaning of the prohibition of the tenth section of the first article of the Constitution of the United States. *Mechanics and Traders' Bank v. Debolt*, 591.
 13. The power of taxation is a part of the legislative sovereignty of the state, and is not the subject of contract, of barter, or sale by the legislature; and if the legislature were to attempt to make such contract it would be a fraud upon the government, and of necessity void. *Ib.* 591.
 14. The franchise of a private corporation is a trust of civil authority, which, under our system of government, must remain at all times subservient to the public welfare, the chief end and object of the delegation of all civil power by the people, and is therefore not the legitimate subject-matter of contract or sale. *Bank of Toledo v. Bond*, 622.
 15. The charter of a private corporation is in form, and in its inherent terms and nature, a law, and does not possess the essential elements of a contract, to-wit, two competent contracting parties, a proper subject-matter, a legal consideration, and a mutuality of obligation; and therefore does not come within the purview and true intent of the clause of the Constitution of the United States which prohibits a state from passing any law impairing the obligation of a contract. *Ib.* 622.
 16. The legislative power includes as well the power to amend and repeal existing laws as the power to enact laws. And the legislature is incompetent

 Constitutional Law—Contracts.

CONSTITUTIONAL LAW—*Continued.*

- to make any contract or arrangement whereby the legislative power can be, to any extent, surrendered or abridged. *Ib.* 622.
17. While the government is bound in *good faith* to protect and keep inviolate the contracts made, and rights of private property vested under the authority and regulations of the charters of private corporations, in common with all other private property, as one of the sacred and primary objects of all civil government; yet such contracts are made and property vested subject to the implied condition, that the legislative power of the state remains undiminished in any manner, and always subject to be exercised, whenever the paramount object of its creation, the public welfare, shall require it. *Ib.* 622.
 18. The property of every person, however absolute the tenure by which it is held, must be liable to bear an equal and just proportion of the public burdens, by way of taxation, in return for the protection and advantages afforded by the government, and that proportion of taxation must be determined by the legislative power, which extend to all persons and property within the state. *Ib.* 622.
 19. The taxing power, which constitutes a branch of the legislative power, and which is of vital importance, and essential to the existence of government, can not be surrendered or abandoned, either in whole or in part, by the legislature, to promote private and individual interests, so as to limit the power and control of future legislation over it; but like the right of *eminent domain*, and the right of *control over existing laws by amendment and repeal*, both of which are also vital and essential prerogatives of the legislative power, must continue in unabridged subserviency to the *public safety and welfare*, the original and paramount purpose of the delegation of all civil power by the people. *Ib.* 622.
 20. The act to erect the county of Noble, passed March 11, 1851, is not inconsistent with the present constitution of the state, nor repealed by it. *Evans v. Dudley*, 438.
 21. The appellate jurisdiction of the supreme court extends only to the judgments and decrees of courts created and organized in pursuance of the provisions of the constitution. *Logan Branch Bank, Ex parte*, 432.
 22. The appeal from the decision of the Auditor of State, provided for in the 74th section of the act of April 13, 1852, "For the assessment and taxation of all property in this state," etc., is in conflict with the provisions of the constitution, from which the jurisdiction of the court is derived, and can not therefore be had. *Ib.* 432.

CONSTRUCTION—

1. OF CONSTITUTION. See CONSTITUTIONAL LAW.
2. OF STATUTES. See STATUTES.
3. OF BONDS.
Mis-recital of condition in injunction bond. *Williamson's Adm'r v. Hall*, 190.
4. OF DEEDS.
Under occupying claimant law. *Beardsley v. Chapman*, 118.
Words of perpetuity wanting in conveyance to trustees upon trusts of perpetual duration. *Williams v. Presbyterian Society*, 478.
5. OF ORDINANCES. See ORDINANCE.
6. OF POWERS.
Authority to sign name. *Palmer v. Yarrington*, 253.
7. OF WILLS.
Words of exclusion, effect of, where there is partial intestacy. *Crane v. Doty*, 279. Bequests to the poor, charitable use. *Urmey's Ex'r v. Wooden*, 160.

CONTRACTS—

1. The acts and contract of persons of weak understanding, and who are

Contracts—Corporations.

CONTRACTS—*Continued.*

- thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion, either that the party, through undue influence, has not exercised a deliberate judgment, or has been imposed upon, circumvented, or overcome by cunning or artifice. Where there is imbecility or weakness of mind, arising from old age, sickness, intemperance, or other cause, and inadequacy of consideration; or where there is weakness of mind, and circumstances of undue influence and advantage; in either case, a contract may be set aside in equity. *Tracey v. Sackett*, 54.
2. The contract of a surety upon an injunction bond is within the statute of frauds, and to be strictly construed, and no parol evidence is admissible to add to, vary, or contradict it in any of its terms. *Williamson's Adm'r v. Hall*, 190.
 3. An agreement to arbitrate can not be enforced by bill in chancery. *Conner v. Drake*, 166.
 4. The right of contribution among sureties is founded, not in the contract of suretyship, but is the result of a general equity which equalizes burdens and benefits; and the common law, which has adopted and given effect to this equitable principle, by an action upon an implied assumpsit, only allows the action where there is a just and equitable ground for contribution. *Russell v. Faylor*, 327.
 5. Where a surety has voluntarily paid money on a void note or obligation, he can not maintain an action against his co-surety for contribution. *Ib.* 327.
 6. A contract untainted with usury when made, will not become void by a subsequent receipt of usurious interest upon it. *Busby v. Finn*, 409.
 7. A judgment upon an usurious contract can not be collaterally impeached, and when made the consideration for another contract, such consideration is not void. So long as the judgment stands it estops the parties to deny the legality of the consideration. *Ib.* 409.
 8. The legal qualities of articles attached to the realty may be determined or ascertained from the agreement and understanding of parties. *Teaff v. Hewitt*, 511.

CONTRIBUTION—

1. The right of contribution among sureties is founded, not in the contract of suretyship, but is the result of a general equity which equalizes burdens and benefits; and the common law, which has adopted and given effect to this equitable principle, by an action upon an implied assumpsit, only allows the action where there is a just and equitable ground for contribution. *Russell v. Faylor*, 327.
2. Where a surety has voluntarily paid money on a void note or obligation, he can not maintain an action against his co-surety for contribution. *Ib.* 327.

CORPORATIONS—

1. When the directors and legally constituted agents of a corporation have, for many years, acquiesced in a subscription to stock, made by a person in the names of his children or others, who have exercised acts of ownership over the stock, and voted upon it, without objection, as their own, the corporation will not afterward be allowed to treat the subscription as if it were a fraudulent use, by the original subscriber, of mere names, to secure a greater number of votes than he would be entitled to under the by-laws if the stock had stood in his own name. *Creed v. Lancaster Bank*, 1.
2. Mere irregularities in organizing a corporation will not deprive the officers and stockholders of the protection of the charter, or subject them to private liability, when sued as unauthorized bankers, under the act of 1816. *Bartholomew v. Bentley*, 37.

Corporations.

CORPORATIONS—*Continued.*

3. But such organization, to protect them, must be *substantially* in accordance with the charter. *Ib.* 37.
4. It is a well-settled rule, that corporations are strictly limited to the exercise of such powers, and in such manner, and by such agents as are provided in the charter creating them. *Ib.* 37.
5. Directors of a bank, elected in 1822, the bank being entirely insolvent and performing no corporate acts from that time until 1839, will not be held to have continued in office until the latter period, although the charter provided that they should continue in office until their successors were elected. On the contrary, so long a suspension from the performance of any official duty will be regarded as an abandonment or resignation of the office. *Ib.* 37.
6. The act of such persons in appointing directors to fill vacancies in the board is entirely void, although the charter provided that a part of the directors of the bank might fill such vacancies. *Ib.* 37.
7. Where the charter provided that stockholders only should be elected directors, persons having no interest in the stock, but fraudulently and collusively receiving the transfer of a share to qualify them, are not eligible; and the stockholders combining in such fraud have no power to confer upon them authority to do corporate acts. *Ib.* 37.
8. Such fraud upon the charter, and combination to defraud the public, will prevent those participating in it from claiming any protection under its provisions to escape private responsibility. *Ib.* 37.
9. The franchise of a corporation can not be impeached or inquired into collaterally; but an inquiry into the unauthorized and fraudulent acts of those claiming under such charter involves no such consideration, and is allowed. *Ib.* 37.
10. It was competent for the legislature, under the constitution of 1802, to construct works of internal improvement on behalf of the state, or to aid in their construction by subscribing to the capital stock of corporations created for that purpose, and to levy taxes to raise the means; and by an exercise of the same power to authorize a county to subscribe to a work of that character running through or into such county, and to levy a tax to pay the subscription. *C. W. & Zanesville R. R. Co. v. Commissioners Clinton County*, 77.
11. The provisions in the charter of the Lake and Trumbull Plank Road Company, passed February 14, 1849, by which the trustees of certain townships are respectively authorized to subscribe to the capital stock of said company, if a majority of the qualified electors of the townships respectively assent thereto, is not in contravention of the constitution of 1802. *Loomis v. Spencer*, 153.
12. A note or other obligation taken by a bank limited by its charter to six per centum interest upon its loans, is void, if more than that is reserved or paid, for want of corporate power to enter into such contract. *Stevens v. Bank of Wooster*, 233.
13. Since the passage of the statute of March, 1850, to improve the law of evidence, which provides that a personal interest in the event of a suit shall not render a witness incompetent; the objection to a stockholder in a corporation testifying as a witness on behalf of the corporation, goes to the credibility, and not to the competency of the witness. *Lawson v. Salem Bank*, 206.
14. By the provisions of the "act to incorporate the State Bank of Ohio, and other banking companies" (43 Ohio L. 24), a bank holds a lien on the shares of its stockholder for the amount of his indebtedness to it, which can not be defeated by a transfer made without the consent of a majority of the directors, nor will such consent authorize a transfer if the debt is overdue and unpaid. *Conant v. Seneca Co. Bank*, 298.
15. Although an assignment on the books of the bank may be necessary to

Corporations—Courts.

CORPORATIONS—Continued.

pass a legal title to stock, yet an equitable title may be otherwise conveyed; and the bank is bound to respect such equity from the time it receives notice of it. *Ib.* 298.

16. It is a violation of said act for one of the independent banks chartered by it to make loans to a director, before the adoption, by the stockholders, of by-laws to regulate the liabilities of directors; and such violation may be a cause of forfeiture of the charter, and will render each director who knowingly participates in or assents to the same, individually liable for all damages which the company, its shareholders, or any other persons, body politic or corporate, shall have sustained in consequence of such violation. But the court are not prepared to say that no debt is created by such a loan. *Ib.* 298.

17. The original stockholders in a literary corporation acting within the scope of the granted powers, are not to be made liable for the acts of those who go beyond them; but the act of incorporation can furnish no protection from private responsibility to those who embark in, or assent to, such unauthorized acts. *Kearney v. Butiles*, 362.

See CHARTER, 4, 5.

COUNCIL, CITY—

Under the charter of the city of Cleveland (which was divided into three wards), a council was elected on the 4th of March, 1850, to serve for one year, consisting of three aldermen elected at large, and three councilmen in each ward, who were required to "reside therein." On the 22d of that month the legislature amended the charter, dividing the city into four wards, and reducing the number of councilmen to two in each ward. By this division some of the councilmen were thrown out of the wards for which they were elected. This amendment made no provision for an election under it until the next year, nor did it provide when it should take effect.

1. The amendatory law had no effect upon the council then elected. The effect of its provisions dividing the city into wards for election purposes must be postponed until they could be called into requisition in future elections. *Scovill v. Cleveland*, 126.
2. If this were otherwise, yet, while the members of the council continued to act *de facto*, their proceedings would be valid. *Ib.* 126.

COURTS—

1. It is the right and duty of the judicial tribunals to determine whether a legislative act drawn in question in a suit pending before them, is opposed to the Constitution of the United States, or of this state, and if so found, to treat it as a nullity. *C. W. & Zanesville R. R. Co. v. Comm'rs of Clinton Co.*, 77.
2. In such case the presumption is always in favor of the validity of the law; and it is only when manifest assumption of authority and a clear incompatibility between the constitution and the law appear, that the judicial power will refuse to execute it. *Ib.* 77.
3. The propriety of permitting a complainant to dismiss his bill without prejudice rests in the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well defendant as complainant. *Conner v. Drake*, 166.
4. Where the court of common pleas proceeds to render a decree as to one of several defendants, whose interests are inseparably connected, leaving the case as to such other defendants undisposed of, such decree is, so far as the right of appeal is concerned, a nullity, and can be set aside by the court rendering the decree, at a subsequent term, for irregularity. *Dougherty v. Walters*, 201.
5. The law making it the duty of the court of common pleas, at the time of the rendition of the judgment or decree in certain cases, to ascertain and

 Courts—Courts, Foreign.

COURTS—Continued.

- fix the penalty of the appeal bond, to be given in the event of an appeal, requires this act to be performed by that court without the motion of either party in the cause. *Hubble v. Renick*, 171.
6. The omission of the court of common pleas to do this act, will not deprive a party of his appeal, when he has, by giving notice and executing an appeal bond, done all upon his own part which the law requires, to entitle him to the appeal. *Ib.* 171.
 7. In case of this omission by the common pleas, the appellant should give his bond, with security to the approval of the clerk of the court, or one of the judges thereof. And if the appeal bond should be found insufficient or defective, the district court can order another bond to be given. *Ib.* 171.
 8. Where the parties have waived the intervention of a jury, and submitted the trial of a civil cause upon its merits to the judges of the district court, the facts should be found by the court, or ascertained by an agreed statement between the parties, before the case can be regularly reserved for decision by this court on the legal questions arising upon the merits. *Ib.* 171.
 9. A creditor can not, at his option, transfer the settlement of the estate of his deceased debtor from the probate court to a court in chancery. *McDonald v. Aten*, 293.
 10. The representatives of an estate may be so situated with reference to interests sought to be converted into assets, that a creditor may invoke the aid of a court of equity to control such interests, and place them into the hands of such representatives to be administered; but equity will go no further, and leave the settlement of the estate to the probate court. *Ib.* 293.
 11. The act of April 30, 1852, makes applicable to the courts under the present constitution the remedies provided by the act of March 12, 1845, "to regulate the practice of the judicial courts." *Shepler v. Dewey*, 331.
 12. The issuing of a writ of error under the sixth section of the act of March 12, 1845, is not inconsistent with the legislation under the present constitution, and may be done, as of course. *Ib.* 331.
 13. The decisions of the highest judicial tribunal in the state, in questions affecting rights of property which becomes valuable and changes hands upon the faith of such decisions, will not be disturbed without the most urgent necessity to prevent injustice or vindicate obvious principles of law. *Kearney v. Buttles*, 362.
 14. To authorize the district court to reserve a cause, and send it to the supreme court for decision, on account of the character of the questions which arise in the case, the questions should be such as require the decision of the court of dernier resort, and not such as are well settled and of familiar application. *Jenkins v. Pearson*, 381.
 15. The present supreme court being a distinct tribunal from the late supreme court in bank, and its successor only as to pending causes, the reporter of the former is not the successor of the reporter of the latter. *Lawrence ex parte*, 431.
 16. The appellate jurisdiction of the supreme court extends only to the judgments and decrees of courts created and organized in pursuance of the provisions of the constitution. *Logan Branch Bank ex parte*, 432.
 17. The appeal from the decision of the auditor of state, provided for in the seventy-fourth section of the act of April 13, 1852, "for the assessment and taxation of all property in this state," etc., is in conflict with the provisions of the constitution, from which the jurisdiction of the court is derived, and can not therefore be had. *Ib.* 432.

COURTS, FOREIGN—

1. The decree of a Virginia court for the sale of lands lying in Ohio is entirely inoperative to transfer or affect any interest of the owner, either legal or equitable. *Price v. Johnson*, 390.

Covenant—Crimes.

COVENANT. See ACTION, 1.

CRIMES—

1. The act of January 17, 1846, the "more effectually to prevent gambling," does not repeal, alter, or modify the act of March 12, 1831, "for the prevention of gaming," but comes in aid of the latter to suppress gambling-houses, and to punish severely the keeper of any gaming device or establishment. *Buck v. The State*, 61.
2. The voluntary permission of a single act of gaming in a house or place not kept "to be used or occupied for gambling," does not come within the act of January 17, 1846, but is provided for by the ninth section of the act of March 12, 1851. *Ib.* 61.
3. D. with his fist assaulted S. in the street. S. instantly stabbed him in five places, of which wounds he died. There was no evidence tending to prove that S., when he gave the fatal wounds, was in danger of loss of life, or limb, or great bodily harm, or that he had a reasonable apprehension of such danger. *Held*: That the killing was not excusable homicide, *se defendendo*. *Stewart v. The State*, 66.
4. When the slayer seeks and provokes an assault upon himself, in order to have a pretext for stabbing his adversary, and does, upon being assaulted, stab and kill him, such killing is not excusable homicide in self-defense. *Ib.* 66.
5. A person assaulted may repel force by force; but it does not follow that he may, without necessity, use a deadly weapon for that purpose. And he is yet more unjustifiable if his weapon is concealed. *Ib.* 66.
6. The third and fourth sections of the statute for the prevention of gaming apply as well to betting on elections as to any other bet. *Veach v. Elliott*, 139.
7. The act to punish betting on elections, and the act more effectually to prevent gambling, have operated to supersede a portion of the seventh and eighth sections of the gaming act, but have not repealed other sections of that statute. *Ib.* 139.
8. An indictment which charges a bank bill to have been false, forged, altered, and counterfeited, is repugnant. *Kirby v. The State*, 185.
9. Where the clerk of the court has placed on the margin opposite the several counts the numbers one, two, and so on, and, by mistake or otherwise, has commenced the numbering on the second count, and the same error has been continued through the whole of the counts, and the jury have returned a verdict of guilty on the seventh and eighth counts, as marked, it is error for the court to sentence the defendant on the seventh and eighth counts of the indictment, being the sixth and seventh counts as marked. *Woodford v. The State*, 428.
10. Where the court have passed separate sentences on the defendant on two counts of an indictment, on one of which counts he has been found guilty, and on the other of which he has been acquitted, and have made the sentence on which he was convicted to commence at the expiration of his term on the count on which he was not convicted, the whole judgment must be reversed. *Ib.* 428.
11. Where an offense forms but one transaction, and the indictment containing several counts on which the jury have returned a verdict of guilty, it is error in the court to sentence on each count separately. *Ib.* 428.
12. Upon the trial of an indictment for robbery, under the fifteenth section of the crimes act, by putting in fear the prosecuting witness, it is not necessary to show that the property taken was actually severed from his person. It is enough if the property was in his presence and under his immediate control, and he laboring under such fear, the property was taken by the accused, with intent to steal or rob. *Turner v. The State*, 422.
13. The terms "personal property," used in the act, are sufficiently comprehensive to include bank notes and other choses in action. *Ib.* 422.

Crimes—Debtor and Creditor.

CRIMES—Continued.

14. Where the indictment avers an actual stealing of bank notes, the intent to steal named in the statute is necessarily included, as well as the knowledge that they were such. *Ib.* 422.
15. In such case, if the indictment contains a particular description of the bank notes taken, but erroneously averring them to be "money, goods, and chattels," these words may be rejected as surplusage; and the count will be good. *Ib.* 422.

CUSTOM—

Of trade or of business at particular place. Whether admissible in evidence. *Chase v. Washburn*, 244.

DEBTOR AND CREDITOR—

1. The statute of 1838, relating to assignments of the property of a failing debtor, for the purpose of preferring creditors, does not embrace all cases of assignments made by an insolvent debtor; but only refers to those cases where the assignee stands in the character of a trustee, other than his merely receiving a conveyance to secure his own claim. *Doremus v. O'Harra*, 45.
2. Where A. had executed to B. certain notes evidencing a debt, and had, at the same time, executed a bond and power of attorney to confess a judgment for the same debt, and B., having assigned the notes to his creditors, and having entered up judgment in his own name for the amount of the debt on the bond and warrant of attorney, and having afterward received an assignment of property from A., who was in failing circumstances, for the security of the debt, B., in such case, must be held to be a trustee, and the assignment thus made to him must inure to the benefit of all the creditors of said debtor, under the provisions of the statute of 1838. *Ib.* 45.
3. The mere fact that a donor subsequently becomes insolvent will not avoid his gift. It must be shown that an intention to defraud future creditors existed in the mind of the donor at the time the gift was made, to justify the court in setting it aside. *Creed v. Lancaster Bank*, 1.
4. The statute of 1838 (Swan's Stat. 717), relating to conveyances to trustees in trust to prefer creditors, does not apply to the case of a creditor taking security for a debt from an insolvent debtor, where the security is taken in good faith, and where the sole object of it is to secure a debt. *Atkinson v. Tomlinson*, 237.
5. Where A. and B. are the sureties of C., and C. in failing circumstances makes a transfer in good faith to A. and B. solely for the purpose of securing them for their liabilities for him, such transaction does not fall within the statute of 1838; but they have a right to the proceeds of such property, to be applied exclusively to the payment of the debts for which they are liable. *Ib.* 237.
6. No action will lie by obligee against obligor on a bond, the consideration of which is a sale made by the former to the latter to defraud creditors; both of them having been guilty of the fraudulent intent. *Goudy v. Gehhart*, 262.
7. A creditor can not, at his option, transfer the settlement of the estate of his deceased debtor from the probate court to a court of chancery. *McDonald v. Aten*, 293.
8. The representatives of an estate may be so situated with reference to interests sought to be converted into assets, that a creditor may invoke the aid of a court of equity to control such interests, and place them into the hands of such representatives to be administered; but equity will go no further, and leave the settlement of the estate to the probate court. *Ib.* 293.
9. Where the dower interest of a widow, in property sought to be converted

Debtor and Creditor—Deed.

DEBTOR AND CREDITOR—*Continued.*

- into assets, is manifest, it will be protected, although she may not have filed an answer. *Ib.* 293.
10. Upon the decease of a debtor, his estate, real and personal, by law, stands for the payment of his general creditors alike, and one creditor can not, by superior diligence, acquire a superior right to such estate. *Ib.* 293.
 11. Although a debt is void, yet, if it be paid, a creditor at large of the payer can not reach the money or property with which it is paid; such creditor having no lien upon, or specific interest in, such money or property, at the time of payment. *Conant v. Seneca County Bank*, 298.
 12. When a debtor voluntarily pays the collection fees of the creditor's attorney, and no part of them is retained by the creditor, but they all go to the attorney, and the transaction is not a shift to obtain usurious interest, a note subsequently given by a surety of the debtor for a balance of the debt remaining due is not void for usury. *Busby v. Finn*, 409.
 13. If a debtor make an assignment to pay debts, some of which are usurious, no beneficiary of the trust who comes in under it can object to the payment of such usurious debts. *Ib.* 409.

DECLARATION. See PLEADINGS, 1, 2, 3, 4.

DEED—

1. The words "by a deed duly authenticated and recorded," in the occupying claimant law, mean a deed to the person under whom the occupant claims, and not a deed to the occupant himself. *Beardsley v. Chapman*, 118.
2. And the provision in the act requiring a deed duly authenticated and recorded to the occupant's grantor, must mean a deed apparently conveying an estate, which, when transmitted to the occupant, will justify him in making lasting and valuable improvements, and demanding payment for them before yielding possession. *Ib.* 118.
3. The general rule is that a person is not chargeable with notice of an adversary title, in the absence of proof, but that he is bound to know the defects apparent upon his own title papers, and is required to take notice of the recitals in the chain of deeds or other muniments under which he claims. *Ib.* 118.
4. Where a deed of conveyance for several tracts of land was delivered by grantor to grantee, or his agent, who acknowledged the receipt of the same, but in so doing added a condition that the deed should be received in satisfaction of a bond of the grantor and others, held by the grantee, in case the grantor's title to the premises mentioned in the deed should be found, on an examination of the records, to be good, and the grantee, after retaining the deed for some months, and ascertaining that the title was defective as to part of the lands described in the deed, handed the deed back to the grantor or his co-obligor in the bond, the title to that part of the lands of which the grantor was seized passed to the grantee, and was not reconveyed by the mere return of the deed. *Baldwin v. Bank of Massillon*, 141.
5. A plea of tender of a deed should either set out the deed in the plea or make profert of it. *Taylor v. Browder*, 225.
6. A deed to certain persons, as "Trustees of the Presbyterian Congregation of Cincinnati, and their successors forever," "for the use, benefit, and behoof of the aforesaid congregation forever," there being then but one such congregation, is not void for uncertainty as to the beneficiaries of the trust, although they were not then incorporated. *Williams v. Presbyterian Society*, 478.
7. Where a deed was evidently designed to convey a fee, a court of equity will not lend itself to defeat the intent. If it would be reformed in equity, no person who would be bound by it when reformed, can found an equity upon its defects. *Ib.* 478.

Dedication—Devise.

DEED—*Continued.*

8. Where a legal estate is granted or devised to trustees, without words of perpetuity, upon trusts of perpetual duration, there is much reason and authority for holding that the legal estate taken by the trustees is commensurate with the trust, and, therefore, a fee. *Ib.* 478.
9. The legal qualities of articles attached to the realty may be determined or ascertained from the agreement and understanding of parties; and a sale and conveyance of a mill or manufacturing establishment, as such, by any general name, or terms of description commonly understood to embrace all its essential parts, passes the machinery belonging to such mill or establishment, whether affixed to the freehold or not; but otherwise if the language is merely descriptive of the realty, with its appurtenances. *Teaff v. Hewitt*, 511.

DEDICATION—

1. A dedication by the original proprietors of a town, of a parcel of ground therein, for public uses, is valid, although they held but an equitable estate in the premises; and their trustee, holding but a naked legal title for their use, is bound to respect such dedication. *Williams v. Presbyterian Society*, 478.
2. Such dedication, made before any legislative act required town plats to be recorded, is valid without such record. *Ib.* 478.
3. And it is valid although there was no grantee *in esse*, when it was made, capable of taking the fee. *Ib.* 478.
4. Property dedicated to public uses, without any provision for a forfeiture, does not revert to the dedicators upon a misuser of it. It is only when the uses become impossible of execution that it can revert. *Ib.* 478.
5. The right of a county or town to property thus dedicated may be barred by the statute of limitations, or lost by lapse of time. *Ib.* 478.
6. So may a right of the dedicators to enforce a specific execution of the purposes of the dedication. *Ib.* 478.
7. Such dedicators have not, by mere operation of law, exclusive of any provision in the act of dedication, a visitatorial power. *Ib.* 478.

DELIVERY. See DEED, 4.

DEMAND AND NOTICE. See BILL OF EXCHANGE.

DEPOSIT. See BAILMENT.

DEPOSITIONS—

A writ of certiorari does not lie to review the order of a court of equity overruling exceptions to testimony. *Galloway v. Stophlet*, 434.

DESCENT AND DISTRIBUTION—

1. A testator can not, by any words of exclusion used in his will, disinherit one of his lawful heirs, in respect to property not disposed of by his will. *Crane v. Doty*, 279.
2. Such words can not be used to control the course of descent, so as to carry the property to his other heirs. *Ib.* 279.
3. They can not be used to raise an estate, by implication, in favor of his other heirs; there being no attempt in the will to dispose of the property, or to create any interest therein. *Ib.* 279.

DESCRIPTION—

1. Of persons to take as beneficiaries of a trust for the use of a congregation unincorporated at the time. *Williams v. Presbyterian Church*, 478.
2. Of a judgment, misrecited in the condition of an injunction bond, corrected by the bill, which is referred to in the bond itself. *Williamson's Adm'r v. Hall*, 190.
3. Of a mill or manufactory, to pass the machinery not annexed as fixtures to the freehold. *Teaff v. Hewitt*, 511.

DEVISE. See WILL, 1, 5.

Director—Equity.

DIRECTOR—

It is a violation of the act to incorporate the State Bank of Ohio and other banking companies, for one of the independent banks chartered by it to make loans to a director, before the adoption, by the stockholders, of by-laws to regulate the liabilities of directors; and such violation may be a cause of forfeiture of the charter, and will render each director, who knowingly participates in, or assents to the same, individually liable for all damages which the company, its shareholders, or any other persons, body politic or corporate, shall have sustained in consequence of such violation. *Conant v. Seneca Co. Bank*, 298.

DISABILITY—

- Of INFANTS. See INFANTS.
- Of INSANE PERSONS. See LUNATIC, 3. 4.
- Of Co-TENANT. See LIMITATIONS, 2.
- Of Co-DEFENDANT. See LIMITATIONS, 5.
- Of FEME COVERT. See PARTIES, 5.

DOWER—

1. Where the dower interest of a widow, in property sought to be converted into assets, is manifest, it will be protected, although she may not have filed an answer. *McDonald v. Aten*, 293.
2. Shares in railroad companies are personal property, whether the companies are, or are not, subject to the provisions of the "act regulating railroad companies," passed February 11, 1848. Dower can not be assigned therein. *Johns v. Johns*, 350.

EJECTMENT—

Proceedings for assessment of the value of improvements after recovery in ejectment. *Beardsley v. Chapman*, 118.

ELECTIONS—

1. The third and fourth sections of the statute for the prevention of gaming apply as well to betting on elections as to any other bet. *Veach v. Elliott*, 139.
2. The act to punish betting on elections, and the act more effectually to prevent gambling, have operated to supersede a portion of the seventh and eighth sections of the gaming act, but have not repealed other sections of that statute. *Ib.* 139.

EMINENT DOMAIN. See *C. W. & Zanesville Railroad v. Clinton County*, 77.

ENTRY AND SURVEY—

In name of deceased person, void. *Price v. Johnson*, 390.
See SURVEY.

EQUITY—**APPEAL.**

1. Where the claim of a complainant in a chancery proceeding against several defendants is separate and distinct, so that the case can be tried as to one or more of the defendants without interfering with the rights or liabilities of the other defendants, it is competent for a court of chancery to pass on the case and render a separate decree as to such defendants, and such decree may be appealed from, although the rest of the case may be undisposed of in the court below. *Dougherty v. Walters*, 201.
2. An appeal of one branch of a case will not bring into the appellate court parties whose cause has not been adjudicated in the court below, although such parties would be necessary in the appellate court, to enable it to render a decree. *Ib.* 201.
3. An appeal from a final decree opens up the whole merits of the cause for investigation, which were involved in, or connected with, the subject-matter of such decree. *Teaff v. Hewitt*, 511.

Equity.

EQUITY—Continued.

ARBITRATION.

1. Chancery will not compel specific performance of an agreement to arbitrate. *Conner v. Drake*, 166.
2. Parties, by agreement, can not change the mode of proceeding in the trial of a cause in court; but each party has a right to demand that the cause shall be tried in the ordinary way, although he may previously have entered into an agreement that certain questions arising in the controversy should be submitted to arbitration. *Ib.* 166.

ASSIGNMENTS.

1. The statute of March 14, 1838, relating to assignments of the property of a failing debtor, for the purpose of preferring creditors, does not embrace all cases of assignments made by an insolvent debtor; but only refers to those cases where the assignee stands in the character of a trustee, other than his merely receiving a conveyance to secure his own claim. *Doremus v. O'Harra*, 45.
2. Where A had executed to B certain notes evidencing a debt, and had, at the same time, executed a bond and power of attorney to confess a judgment for the same debt, and B having assigned the notes to his creditors, having entered up judgment in his own name for the amount of the debt on the bond and warrant of attorney, and having afterward received an assignment of property from A, who was in failing circumstances, for the security of the debt, B, in such case, must be held to be a trustee, and the assignment thus made to him must inure to the benefit of all the creditors of said debtor, under the provisions of the statute of 1838. *Ib.* 45.
3. The statute of 1838 (Swan, 717), relating to conveyances to trustees in trust to prefer creditors, does not apply to the case of a creditor taking security for his own debt, if the security is taken in good faith, and where the sole object of it is to secure a debt. *Atkinson v. Tomlinson*, 237.
4. Where A and B are the sureties of C, and C, in failing circumstances, makes a transfer, in good faith, to A and B, solely for the purpose of securing them for their liabilities for him, such transaction does not fall within the statute of 1838; but they have a right to the proceeds of such property, to be applied exclusively to the payment of the debts for which they are liable. *Ib.* 237.
5. By the provisions of the "act to incorporate the State Bank of Ohio, and other banking companies" (43 Ohio L. 24), a bank holds a lien on the shares of its stockholder for the amount of his indebtedness to it, which can not be defeated by a transfer made without the consent of a majority of the directors, nor will such consent authorize a transfer if the debt is overdue and unpaid. *Conant v. Seneca County Bank*, 298.
6. Although an assignment on the books of the bank may be necessary to pass a legal title to stock, yet an equitable title may be otherwise conveyed, and the bank is bound to respect such equity from the time it receives notice of it. Hence debts contracted by the assignor to the bank, after receipt of such notice, are not, as against the assignee, liens upon the stock. *Ib.* 298.
7. Notice of such assignment to the cashier is notice to the bank. *Ib.* 298.

BILL OF REVIEW.

1. Under the Ohio statute (46 Ohio L. 90), the court, upon a bill of review, are required to look into the evidence upon which the original decree was founded. *Creed v. Lancaster Bank*, 1.
2. Where the defendants in the original cause are in default in not answering a supplemental bill, but the decree of the court is not founded on the charges in the supplemental bill, but is contradictory thereto, such default will not operate as a bar to a bill of review. *Ib.* 1.
3. Mere difference of opinion as to the weight of evidence given in the court

Equity.

EQUITY—Continued.

below will not justify the reversal of a decree upon a bill of review. *Tracey v. Sackett*, 54.

4. Persons who have an interest in the subject-matter affected by the original decree may properly be joined as complainants in a bill of review. *Creed v. Lancaster Bank*, 1.
5. Where a question of damages arises, it is not error in the court, by the consent of both parties, to permit the amount to be fixed by arbitrators, and to decree the amount thus found. *Connor v. Drake*, 166.
6. All the parties to an original decree should join in a bill of review to reverse it. *Sturges v. Longworth*, 544.
7. Where the interests of two defendants are joint and inseparable, and the rights of one are saved, under the provision of the statute of limitations, on account of his disability, such saving inures to the benefit of the other defendant, although laboring under no disability. *Ib.* 544.

CHARITABLE USE.

1. A residuary clause in a will, in these words: "The remainder of my estate I do hereby give and devise to the poor and needy, fatherless, etc.," of two townships named, "to such poor as are not able to support themselves," is valid and effectual for the purposes therein expressed. *Urmeys's Executor v. Wooden*, 160.
2. The courts of chancery in this state, upon general principles, independently of the statute of charitable uses (43 Elizabeth) have jurisdiction to enforce such trusts. *Ib.* 160.
3. The spirit and policy of the act for the relief of the poor (Swan 637, sec. 13), would also confer such jurisdiction and sustain the bequest. *Ib.* 160.

CONCEALMENT.

See FRAUD, 3.

DISCRETION.

The propriety of permitting a complainant to dismiss his bill without prejudice, rests in the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well defendant as complainant. *Conner v. Drake*, 166.

ESTOPPEL.

1. The purchasers of land under a void decree, it being repudiated by the owners of the warrant, are not estopped from averring that the entry and survey are void, for the purpose of showing that the complainants have no specific equity in the land, and, therefore, no right to demand the legal title. *Price v. Johnston*, 320.
2. On a creditor's bill to subject assets to the payment of a judgment, the parties are, while the judgment remains in force, estopped from showing that it was recovered upon a usurious contract. *Bank of Wooster v. Stevens*, 233.

FRAUD.

1. The acts and contracts of persons of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion, either that the party through undue influence has not exercised a deliberate judgment, or has been imposed upon, circumvented, or overcome by cunning or artifice. Where there is imbecility or weakness of mind, arising from old age, sickness, intemperance, or other cause, and inadequacy of consideration; or where there is weakness of mind, and circumstances of undue influence and advantage; in either case, a contract may be set aside in equity. *Tracy v. Sackett*, 54.
2. Subsequent insolvency of donor will not avoid a gift to a member of his family; it must be shown that an intention to defraud future creditors existed in the mind of the donor at the time of the gift. *Creed v. Lancaster Bank*, 1.

Equity.

EQUITY—Continued.

3. There are cases of fraud that render the defense of lapse of time unavailable: as where a person has been misled by the representations or practice of his adversary, or kept in ignorance of his rights by one who ought to have disclosed them; but such fraud must be specially averred. The general averment of combination and confederacy is insufficient, even upon demurrer. *Williams v. Presbyterian Society*, 478.

INJUNCTION.

1. Where an injunction to stay the sale of any particular property by virtue of certain levies has been dissolved as to a part of the property only, and continued as to the balance, and the property released not diminished in value in consequence of the injunction, has been sold, and the proceeds of the sale applied on the judgments under which the levies had been made, no decree against the complainant should be rendered, on account of the dissolution of the injunction, for the amount of the judgment, penalty, etc. *Teaff v. Hewitt*, 511.
2. Chancery will interfere to prevent the invasion of a statutory or corporate right or franchise, conferred upon an individual or corporation, against a party attempting to usurp the right, or exercise the franchise so specially conferred. *M. and T. Bank v. Debolt*, 591.
3. But not to prevent a trespass against the property of the individual or corporation which may be compensated in damages, and which does not involve an attempt to exercise the right or franchise against the exclusive grant of the statute or charter. *Ib.* 591.
4. A distraint by a treasurer against the money and property of an incorporated bank, for taxes assessed against it under the act of March 21, 1851, can not be enjoined in chancery. *Ib.* 591.
5. If the act be unconstitutional, the treasurer is a trespasser, and is liable in damages, to be ascertained in a court of law; and there is no principle upon which the interposition of an injunction in such a case could be maintained. *Ib.* 591.

INSANE PERSONS.

See LUNATICS.

JURISDICTION.

1. The courts of chancery in this state, upon general principles, independently of the statute of charitable uses (43 Elizabeth), have jurisdiction to enforce charitable trusts. *Urmeys Ex'r v. Wooden*, 160.
2. The spirit and policy of the act for the relief of the poor (Swan's Stat. 637, section 13), would also confer such jurisdiction and sustain a bequest. *Ib.* 160.
3. A court of chancery will not decree a specific performance of an agreement to arbitrate, nor will it require arbitrators to make an award. *Conner v. Drake*, 166.
4. A creditor can not, at his option, transfer the settlement of the estate of his deceased debtor from the probate court to a court in chancery. *McDonald v. Aten*, 293.
5. The representatives of an estate may be so situated with reference to interests sought to be converted into assets, that a creditor may invoke the aid of a court of equity to control such interests, and place them into the hands of such representatives to be administered; but equity will go no further, and leave the settlement of the estate to the probate court. *Ib.* 293.
6. In a chancery proceeding, where it appears affirmatively that minor defendants have not been served with process, a decree, purporting to determine the rights of such minors, is void. *Moore v. Stark*, 369.
7. The appointment of a guardian *ad litem* for minor defendants, who have not been served with process, does not effect an appearance for them, nor give the court jurisdiction over them; but that the appointment of a guar-

Equity.

EQUITY—Continued.

- dian *ad litem* is for the purpose of defense after appearance has been effected by service of process on the infants. *Ib.* 369.
8. A proceeding to foreclose a mortgage on real estate, although in the nature of a proceeding *in rem*, is still an adversary proceeding, in which the right of the mortgagor is necessarily to be passed on, and jurisdiction over the person and the thing are absolute requisites as in any other adversary proceeding. *Ib.* 369.
 9. The decree of a Virginia court for the sale of lands lying in Ohio is entirely inoperative to transfer or affect any interest of the owner, either legal or equitable. *Price v. Johnson*, 390.
 10. The statute authorizing non-resident defendants to be brought into court by publication in a newspaper, refers as well to lunatic defendants as to sane persons. *Sturges v. Longworth*, 544.
 11. A court of chancery will not interfere to prevent a mere trespass. *Mechanic's and Trader's Bank v. Debolt*, 511.
 12. Where adequate compensation can be had in an action at law, there is no ground to justify the interposition of a court of equity. *Ib.* 511.
 13. Where the injury threatened would be irreparable, or where, from some peculiar circumstances connected with the parties or the transaction, complete redress can not be had at law, a court of chancery is warranted in assuming jurisdiction. *Ib.* 511.

LAPSE OF TIME.

See that title.

MISTAKE.

The court will not consider the question whether relief can be granted in chancery on the ground of mistake without the requisite allegations in the bill to bring the party within the rule of equitable relief under this head of equity jurisdiction. *White v. Denman*, 110.

MORTGAGE.

See that title.

PARTIES.

1. Persons who have an interest in the subject-matter affected by the original decree may properly be joined as complainants in a bill of review. *Creed v. Lancaster Bank*, 1.
2. Where the claim of a complainant in a chancery proceeding against several defendants is separate and distinct, so that the case can be tried as to one or more of the defendants without interfering with the rights or liabilities of the other defendants, it is competent for a court in chancery to pass on the case and render a separate decree as to such defendants, and such decree may be appealed from, although the rest of the case may be undisposed of in the court below. *Dougherty v. Walters*, 201.
3. An appeal of one branch of a case will not bring into the appellate court parties whose cause has not been adjudicated in the court below, although such parties would be necessary in the appellate court to enable it to render a decree. *Ib.* 201.
4. Where the court of common pleas proceeds to render a decree as to one of several defendants, whose interests are inseparably connected, leaving the case as to such other defendants undisposed of, such decree is, so far as the right of appeal is concerned, a nullity, and can be set aside by the court rendering the decree, at a subsequent term, for irregularity. *Ib.* 201.
5. The appointment of a guardian *ad litem* for minor defendants, who have not been served with process, does not effect an appearance for them, nor give the court jurisdiction over them; but that the appointment of a guardian *ad litem* is for the purpose of defense after appearance has been effected by service of process on the infants. *Moore v. Stark*, 369.

Equity.

EQUITY—Continued.

6. All the parties to an original decree should join in a bill of review to reverse it. *Sturges v. Longworth*, 544.

PLEADING AND PRACTICE.

1. Bill.

1. There are cases of fraud that render the defense of lapse of time unavailable, but such fraud must be specially averred. The general averment of combination and confederacy is insufficient, even upon demurrer. *Williams v. Presbyterian Society*, 478.
2. Lapse of time appearing by the bill may be taken advantage of upon demurrer. *Ib.* 478.
3. Where a bill charges, upon the complainant's information merely, that a certain fact exists, its existence is not admitted by a demurrer. *Ib.* 478.
4. The propriety of permitting a complainant to dismiss his bill without prejudice rests in the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well defendant as complainant. *Conner v. Drake*, 166.
5. The court will not consider the question whether relief can be granted in chancery on the ground of mistake, without the requisite allegations in the bill to bring the party within the rule of equitable relief under this head of equity jurisdiction. *White v. Denman*, 110.

2. Answer.

6. Where the dower interest of a widow in property sought to be converted into assets is manifest, it will be protected, although she may not have filed an answer. *McDonald v. Aten*, 293.
7. It is error for the court to decree against a lunatic without an answer from his guardian *ad litem*. *Sturges v. Longworth*, 544.

3. Demurrer.

See BILL, 1, 2, 3.

4. Decree.

8. Where the court of common pleas proceeds to render a decree as to one of several defendants, whose interests are inseparably connected, leaving the case as to such other defendants undisposed of, such decree is, so far as the right of appeal is concerned, a nullity, and can be set aside by the court rendering the decree, at a subsequent term, for irregularity. *Dougherty v. Walters*, 201.
9. In a chancery proceeding, where it appears *affirmatively* that minor defendants have not been served with process, a decree, purporting to determine the rights of such minors, is void. *Moore v. Stark*, 369.
10. The decree of a Virginia court for the sale of lands lying in Ohio, is entirely inoperative, to transfer or affect any interest of the owner, either legal or equitable. *Price v. Johnston*, 390.
11. When a decree is taken, as on petition confessed, against a lunatic and his guardian *ad litem*, as in default for answer, plea, or demurrer, even if the court had heard evidence as to the complainant's claim, it would not have cured the error: such evidence would be heard out of time. *Sturges v. Longworth*, 544.
12. A decree in chancery, which leaves the equity of the case, or some material question connected with the merits of the controversy, for future determination, is an interlocutory and not a final decree. *Teaff v. Hewitt*, 511.

5. Defense.

13. The defense of usury may be set up in equity to a suit brought to enforce the usurious contract. *Stevens v. Bank of Wooster*, 233.
14. The purchasers of land, under a void decree, it being repudiated by the owners of the warrant, are not estopped from averring that the entry and survey are void, for the purpose of showing that the complainants have no

Equity.

EQUITY—Continued.

specific equity in the land, and therefore no right to demand the legal title
Price v. Johnston, 390.

See TRUSTS AND TRUSTEES, 11.

6. *Depositions.*

15. A writ of certiorari does not lie to review the order of a court of equity, overruling exceptions to testimony. *Galloway v. Stophlet*, 390.

7. *Dismissing Bill.*

16. The propriety of permitting a complainant to dismiss his bill without prejudice rests in the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well defendant as complainant. *Conner v. Drake*, 166.

8. *Publication.*

17. The statute authorizing non-resident defendants to be brought into court by publication in a newspaper, refers as well to lunatic defendants as to sane persons. *Sturges v. Longworth*, 644.

PRESUMPTIONS.

1. Where a person purchases property with his own funds, and places the title in the name of a stranger, the legal presumption is, that he made such purchase for his own use, and that the property is held in trust for him. *Creed v. Lancaster Bank*, 1.

2. But where such purchase and conveyance is made by a man to a member of his own family, the presumption is that the property is intended as a gift or advancement. *Ib.* 1.

3. These are, however, merely abstract presumptions, that may be rebutted by circumstances, or by evidence going to show a different intention; and each case has to be determined by the reasonable presumption arising from all the facts and circumstances connected with it. If, therefore, the court can discover from all the circumstances, a manifest intention in the donor to bestow a gift upon a person not a member of his family, they will so regard it. *Ib.* 1.

See TRUSTS AND TRUSTEES, 10.

SPECIFIC PERFORMANCE.

1. A court of chancery will not decree a specific performance of an agreement to arbitrate, nor will it require arbitrators to make an award. *Conner v. Drake*, 166.

2. Parties, by agreement, can not change the mode of proceeding in the trial of a cause in court; but each party has a right to demand that the cause shall be tried in the ordinary way, although he may previously have entered into an agreement that certain questions arising in the controversy should be submitted to arbitration. *Ib.* 166.

3. The right of the dedicators to enforce a specific execution of the purposes of the dedication, may be barred by the statute of limitations or lost by lapse of time. *Williams v. Presbyterian Society*, 478.

SPECIFIC EQUITY.

1. The holder of a warrant for lands, in the Virginia military district, before location or entry, has no such specific equity, to any particular tract as a court of chancery can notice or enforce. *Price v. Johnston*, 390.

2. Although a debt is void, yet if it be paid, a creditor at large of the payer can not reach the money or property with which it is paid; such creditor having no lien upon, or specific interest in, such money or property, at the time of payment. *Conant v. Seneca Bank*, 398.

STATE EQUITY.

Where there is equity against equity, the rule "prior in time, stronger in right," does not prevail, if the prior equity has become stale, and the subsequent equity has not. *Williams v. Presbyterian Society*, 478.

Equity of Redemption—Error.

EQUITY OF REDEMPTION—

1. Where the owner of a certificate of entry of land from the United States assigns such certificate as security for a debt, with a condition of defeasance, on the payment of the debt, such assignment creates an equitable mortgage on the land covered by such certificate. *Stover v. Bounds*, 107.
2. Where the assignee of such certificate sells the same to a person who has notice of the terms on which it was first assigned, such subsequent assignee will hold the same subject to the right of the original assignor to redeem. *Ib.* 107.
3. The right of the original assignor to redeem will not be affected by a provision in the condition of defeasance that his right to redeem is limited to a fixed time after the transaction. Once a mortgage, always a mortgage. *Ib.* 107.

EQUITABLE TITLE—

1. Although an assignment on the books of a bank may be necessary to pass a legal title to stock, yet an equitable title may be otherwise conveyed; and the bank is bound to respect such equity from the time it receives notice of it. Hence debts contracted by the assignor to the bank, after the receipt of such notice, are not, as against the assignee, liens upon the stock. *Conant v. Seneca County Bank*, 298.
2. Where a person holds a full and perfect equitable title to stock, of which the bank has notice, he is also entitled in equity to the dividends thereafter accruing upon it. *Ib.* 298.
3. Where a legal estate is granted or devised to trustees, without words of perpetuity, upon trusts of perpetual duration, there is much reason and authority for holding that the legal estate, taken by the trustees, is commensurate with the trust, and, therefore, a fee. *Williams v. Presbyterian Society*, 478.
4. But wherever the legal title goes, upon the death of the grantee or devisee, it remains charged with the trust. *Ib.* 478.
5. And even if the trustees do not take a fee, yet if the trust is created by deed, containing a covenant of general warranty binding the grantor and his heirs forever, such deed may operate by way of estoppel to confirm to the beneficiaries of the trust the perpetual and beneficial estate in the land. *Ib.* 478.
6. Where a deed was evidently designed to convey a fee, a court of equity will not lend itself to defeat the intent. If it would be reformed in equity, no person who would be bound by it when reformed, can found an equity upon its defects. *Ib.* 478.

ERROR—

1. In a criminal, as well as in a civil case, the judgment will not be reversed for a misdirection of the court to the jury on an abstract question of law that could not arise upon the testimony, or influence the decision of the jury. *Stewart v. The State*, 66.
2. It is not error to charge a jury "to take into consideration the manner by which, and purposes for which, the prisoner had the possession of the knife with which he committed the homicide." *Ib.* 66.
3. When a court has charged a jury upon a point, and afterward an instruction is prayed, which, in substance, is the same as the charge given, it is not error to decline giving it on the ground that the court has already charged on that point. *Ib.* 66.
4. It is not error to excuse a struck juror from serving for good cause shown, and that he is postmaster is good cause. *Ib.* 66.
5. Where the court of common pleas erred in ruling as to a material fact in the defense, and the bill of exceptions does not profess to show all the evidence, so as to enable this court to ascertain that the defendants were not prejudiced by such erroneous ruling, a judgment against the defendants will be reversed. *Baldwin v. Bank of Marillon*, 141.

Error—Estates of Decedents.

ERROR—Continued.

6. A judgment can not be reversed on error because the form of action was misconceived, "in case the facts are substantially alleged which the party was bound to prove on the trial, in order to entitle him to a recovery." *Taylor v. Browder*, 225.
7. Where the court of common pleas declined to charge the jury as requested by the defendants, in regard to a matter in which the compliance of the court with the request could not have aided the defense, such refusal of the court constitutes no ground of error for the reversal of the judgment. *Chase v. Washburn*, 244.
8. An exception to the judgment of a court below ruling out evidence, can not be considered, unless such evidence is spread upon the record. *Palmer v. Yarrington*, 253.
9. The reasons assigned by a court for its judgment are immaterial if the record show that such judgment was, in fact, correct. *Ib.* 253.
10. A writ of error in a criminal case requires an allowance, and the better opinion seems to be that the jurisdiction is dependent upon its being allowed, and that, therefore, the allowance can not be waived. *Farris v. The State*, 188.
11. But if it could be waived, it is not waived where the record shows no express waiver, and no plea or joinder is filed by the state. *Ib.* 188.
12. In such case the court of errors should quash the writ; and if, instead of so doing, it affirm the judgment of the inferior court, the judgment of affirmance will be reversed, because the writ was not allowed. The parties will then stand as if no writ had ever issued. *Ib.* 188.
13. It is irregular to return the original files in a criminal case, instead of a transcript with a writ of error. The statute authorizing the original papers to be sent up relates to civil causes only. *Ib.* 188.
14. Whether a writ of error in a civil cause issues as of course. Query. *Ib.* 188.
15. An indictment which charges a bank bill to have been false, forged, altered, and counterfeit, is repugnant. *Kirby v. The State*, 185.
16. Where a question of damages arises it is not error in the court, by the consent of both parties, to permit the amount to be fixed by arbitrators, and to decree the amount thus found. *Conner v. Drake*, 166.
17. A judgment will not be reversed on error for the action of the court below in regard to a matter resting within its discretion. *Legg v. Drake*, 286.
18. The act of April 30, 1852, makes applicable to the courts under the present constitution the remedies provided by the act of March 12, 1845, "to regulate the practice of the judicial courts." *Shepler v. Dewey*, 331.
19. The issuing of a writ of error under the sixth section of the act of March 12, 1845, is not inconsistent with the legislation under the present constitution, and may be done, as of course. *Ib.* 331.
20. A judgment of a court of competent jurisdiction, rendered by consent of parties, will not be reversed on error. *Wells v. Martin*, 386.
21. Where no assignment of errors is filed, the judgment may be affirmed for that reason. *Ib.* 386.
22. A plaintiff will not be permitted to allege errors, *visa voce*, at the hearing, which he has not assigned. *Ib.* 386.
23. Papers not set out in, or attached to the bill of exceptions, or in some way so connected therewith as to make them a part thereof, can not be taken as parts of the bill. *Ib.* 386.
24. An erroneous admission of testimony on a trial by jury is of no moment, if the jury be afterwards, by consent of the parties, discharged without rendering a verdict. *Ib.* 386.

ESTATES OF DECEDENTS—

1. A creditor can not, at his option, transfer the settlement of the estate of

 Estates of Decedents—Evidence.

ESTATES OF DECEDENTS—*Continued.*

- his deceased debtor from the probate court to a court in chancery. *McDonald v. Aten*, 293.
2. The representatives of an estate may be so situated with reference to interests sought to be converted into assets, that a creditor may invoke the aid of a court of equity to control such interests, and place them into the hands of such representatives to be administered; but equity will go no further, and leave the settlement of the estate to the probate court. *Ib.* 293.
 3. Upon the decease of a debtor, his estate, real and personal, by law, stands for the payment of his general creditors alike, and one creditor can not, by superior diligence, acquire a superior right to such estate. *Ib.* 293.
 4. Shares in railroad companies are personal property, whether the companies are or are not subject to the provisions of the "act regulating railroad companies," passed February 11, 1848. *Johns v. Johns*, 350.

ESTOPPEL—

1. A judgment upon an usurious contract can not be collaterally impeached, and when made the consideration for another contract, such consideration is not void. So long as the judgment stands it estops the parties to deny the legality of the consideration. *Busby v. Finn*, 409.
2. If trustees of property dedicated to public use do not take a fee, yet if the trust is created by deed, containing a covenant of general warranty binding the grantor and his heirs forever, such deed may operate by way of estoppel to confirm to the beneficiaries of the trust the perpetual and beneficial estate in the land. *Williams v. Presbyterian Society*, 478.
3. When a usurious contract has been merged in a judgment, and a creditor's bill brought to obtain satisfaction, the parties to it are estopped while it remains in force, from averring or proving such illegality to have existed in the obligation upon which it was founded, for the purpose of impeaching the judgment. *Bank of Wooster v. Stevens*, 233.

EVIDENCE—

1. Where an act of a party is admissible in evidence, his declarations, at the time, explanatory of that act, are also admissible as a part of the *res geste*. *Wetmore v. Mell*, 26.
2. Where A's promise to marry B is shown, evidence that B had received A's attentions for four years, and prepared for marriage by procuring bedding, etc., and of B's statements to her sister at the time, explanatory of such acts of preparation, is competent to show her acceptance of such promise. *Ib.* 26.
3. Declarations of the party, made after suit brought, or after a rupture between the parties, would be clearly inadmissible. *Ib.* 26.
4. In a trial for murder in the second degree, the state may prove previous threats made by the defendant against the person he afterward killed, in order to show that the killing was malicious. *Stewart v. The State*, 66.
5. The heir is a competent witness for the administrator, under the act to improve the law of evidence, in a suit brought by the latter to recover a debt due the estate. *Butt v. Butt's Adm'r*, 221.
6. Under the plea of non-assumpsit, without affidavit, a defendant may give evidence to disprove the execution of the note on which suit is brought. *Palmer v. Yarrington*, 253.
7. The contract of a surety upon an injunction bond is within the statute of frauds, and to be strictly construed, and no parol evidence is admissible to add to, vary, or contradict it in any of its terms. *Williamson's Adm'r v. Hall*, 190.
8. In the argument of a cause before the court or jury, counsel has a right, by way of argument or illustration, either to read from a book a pertinent quotation or extract from a book of science or art, or other publication

Evidence—Fixtures.

EVIDENCE—*Continued.*

- adopting it and making it a part of his own address to the jury, but not using it as evidence in the case. *Legg v. Drake*, 286.
9. The affidavit of a party to a suit may be received to prove the loss of a writing, in order to let in secondary evidence of its contents. *Wells v. Martin*, 386.
 10. The fact of loss is to be established to the satisfaction of the court, not conclusively, for that is not required, but reasonably. To do this may, in some cases, where there is more than one party on the side offering the testimony, require the affidavits of all of them. In other cases, an affidavit of one of them may be sufficient. No general rule can be laid down upon the subject. The ruling must depend upon the circumstances of each case. *Ib.* 386.
 11. Oral evidence inadmissible to supply any material part of the obligation or condition of a recognizance. *Ohio v. Crippen*, 399.
 12. Or to correct a mistake in an injunction bond. *Williamson's Adm'r v. Hall*, 190.

EXAMINATION—

1. Where a party to an action is called upon and introduced as a witness on the trial by the adverse party, under the act of March, 1850, to improve the law of evidence, the objection to his competency is waived, and he becomes competent as a witness on the trial for all purposes. *Legg v. Drake*, 286.
2. When a witness is produced and examined by a party in an action, even though he be interested, to testify against the party calling him, the other party is not limited, in his cross-examination, to the subject-matter of the examination-in-chief, but may cross-examine him as to all matters pertinent to the issue on trial, limited, however, by the rule, that a party can not, before the time of opening his own case, introduce his distinct grounds of defense or avoidance, by the cross-examination of his adversary's witnesses. *Ib.* 286.
3. When the cross-examination is extended to topics disconnected with the particular facts disclosed in the direct examination, leading questions to the witness may be proper or improper according to circumstances, and the control of this must rest within the discretion of the court. *Ib.* 286.

EXCEPTIONS. See BILL OF EXCEPTIONS.

FIXTURES—

1. A fixture is an article which was a chattel, but which, by being affixed to the realty, became accessory to it and parcel of it. *Teaff v. Hewitt*, 511.
2. The true criterion of a fixture is the united application of the following requisites, to-wit: 1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Application to the use or purpose to which that part of the realty with which it is connected is appropriated. 3d. The intention of the party making the annexation to make a permanent accession to the freehold. *Ib.* 511.
3. The criterion of a fixture applicable to machinery in a mill or manufactory is not different from that which applies to articles affixed to the freehold in any other situation. *Ib.* 511.
4. A mill or manufactory, including all its essential parts, may unite in the same business, and for producing a common result, portions of real estate with articles of personal property, retaining all the essential qualities of chattels. *Ib.* 511.
5. The machinery in a woolen factory, consisting of carding-machines, spinning-machines, power-looms, etc., connected with the motive power of the steam engine by bands and straps, but in no wise attached to the building in which used, except by cleats or other means to confine them to their proper places for use, and subject to removal whenever convenience or

 Forfeiture—Gaming.

FIXTURES—Continued.

business may require, without injury are not fixtures, but chattel property. *Ib.* 511.

6. The legal qualities of articles attached to the realty may be determined or ascertained from the agreement and understanding of parties; and a sale and conveyance of a mill or manufacturing establishment, as such, by any general name or terms of description commonly understood to embrace all its essential parts, passes the machinery belonging to such mill or establishment, whether affixed to the freehold or not; but otherwise, if the language is merely descriptive of the realty with its appurtenances. *Ib.* 511.

FORFEITURE—

Property dedicated to public uses, without any provision for a forfeiture, does not revert to the dedicators upon a misuser of it; it is only when the uses become impossible of execution that it can revert. *Williams v. Presbyterian Society*, 278.

See CHARTER, 1.

FORGERY. See INDICTMENT, 6.

FRANCHISE—

1. The franchise of a private corporation is a trust of civil authority, which, under our system of government, must remain at all times subservient to the public welfare, the chief end and object of the delegation of all civil power by the people, and is therefore not the legitimate subject-matter of contract or sale. *Bank of Toledo v. Bond*, 622.
2. The franchise of a corporation can not be impeached or inquired into collaterally, but an inquiry into the unauthorized and fraudulent acts of those claiming under such charter involves no such consideration, and is allowed. *Bartholomew v. Bentley*, 37.

See CHARTER, 1.

FRAUD—

1. No action will lie by obligee against obligor on a bond, the consideration of which is a sale made by the former to the latter to defraud creditors; both of them having been guilty of the fraudulent intent. *Goudy v. Gehhart*, 263.
2. In such a cause, the proof of the fraud may come from the defendant. The rule is, that no one is allowed to set up his own iniquity to defeat an innocent person; but where the parties are *particeps criminis*, the fraud may be proved by the defendant. *Ib.* 263.
3. A gift by a man to a member of his family will not be avoided on account of his subsequent insolvency. A present intention to defraud future creditors must be shown to have existed in the mind of donor. *Creed v. Lancaster Bank*, 1.
4. There are cases of fraud that render the defense of lapse of time unavailable; as where a person has been misled by the misrepresentations or practice of his adversary, or kept in ignorance of his rights by one who ought to have disclosed them. *Williams v. Presbyterian Society*, 778.

See CONTRACTS, 1; EQUITY, title FRAUD.

FRAUDS, STATUTE OF—

The contract of a surety upon an injunction bond is within the statute of frauds, and to be strictly construed, and no parol evidence is admissible to add to, vary, or contradict it in any of its terms. *Williamson's Adm'r v. Hall*, 190.

GAMING—

1. The third and fourth sections of the statute for the prevention of gaming apply as well to betting on elections as to any other bet. *Veach v. Elliott*, 139.
2. The act to punish betting on elections, and the act more effectually to

General Assembly—Indictment.

GAMING—Continued.

prevent gambling, have operated to supersede a portion of the seventh and eighth sections of the gaming act, but have not repealed other sections of that statute. *Ib.* 139.

GENERAL ASSEMBLY. See **LEGISLATURE.**

GENERAL ISSUE. See **PLEADING, 7.**

GUARDIAN AD LITEM—

1. The appointment of a guardian ad litem for minor defendants, who have not been served with process, does not affect an appearance for them, nor give the court jurisdiction over them; but the appointment of a guardian ad litem is for the purpose of defense, after appearance has been effected by service of process on the infants. *Moore v. Stark*, 369.
2. Where a lunatic defendant is a non-resident of the state, and has been brought into court by publication, it is competent for the court to appoint a guardian ad litem to defend the suit, although such guardian ad litem may not have been appointed the general guardian or committee of the lunatic. *Sturges v. Longworth*, 544.
3. It is error for the court to decree against a lunatic without an answer from his guardian ad litem. *Ib.* 544.

HOMICIDE. See **CRIMES.**

HUSBAND AND WIFE—

A wife, who by gross abuse of her husband has been driven beyond the pale of his protection, and a separation *de facto* exists, she living and maintaining herself as a single woman, and having had specific property decreed to her as alimony, may maintain an action at law in regard to such property without the joinder of her husband, although no divorce has been decreed. *Benadum v. Pratt*, 403.

HUCKSTER—

1. An ordinance of the city of Cincinnati, defining a huckster to be "any person, not a farmer or butcher, who should sell, or offer for sale, any commodity not of his own produce or manufacture," and subjecting such person to a penalty, unless he had previously obtained license and paid therefor a sum fixed by the council, is in conflict with the amendment to the charter of the city, and void. *Mays v. Cincinnati*, 268.
2. It was not in the power of the council, by ordinance, to include persons as hucksters who did not fall within the ordinary meaning of that term: *Ib.* 268.
3. The power of taxation upon employment, not being conferred by the city charter, can not be exercised as a means for the prevention of huckstering. *Ib.* 268.

IMPEACHMENT, COLLATERAL. See **JUDGMENT, 2, 4; FRANCHISE, 2; VOID AND VOIDABLE, 1.**

IMPLICATION. See **WILLS, 7.**

INDICTMENT—

1. It is not correct practice to plead specially to an indictment a matter which is competent and proper by way of defense, under the plea of not guilty; but if the state demur generally, or take issue on any such special plea, the irregularity is thereby waived. *Hirn v. The State*, 15.
2. If a special plea to an indictment be determined to be insufficient, the judgment of the court should be *respondeat ouster*; as, in this state, the court could not proceed to final judgment in a criminal case without either a plea of guilty or finding by a jury. *Ib.* 15.
3. A negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment, unless the matter of such exception or proviso enter into and become a part of the description of the offense, or a qualification of the language defining or creating it; but as the exception

Indorser—Injunction.

INDICTMENT—*Continued.*

- of the sale of liquor for medicinal and pharmaceutical purposes in the proviso in the first section of the law of 1851, to restrain the sale of liquor, points directly to the character of the offense, and becomes a material qualification in the statutory description of it, an indictment under this section is defective without the negative averment. *Ib.* 15.
4. An indictment under the ninth section of the act for the prevention of gambling is defective, unless it set forth the names of the person or persons permitted by the accused to play, or an averment that their names are unknown. *Buck v. The State*, 61.
 5. Although, on an indictment containing several counts, some of which are defective, and one of which is good, a general verdict of guilty will be held to apply to the good count, and support the indictment, yet such general verdict will not authorise separate penalties upon separate counts. *Ib.* 61.
 6. An indictment which charges a bank bill to have been false, forged, altered and counterfeit, is repugnant. *Kirby v. The State*, 183.
 7. The terms "personal property," used in section 15 of the crimes act, are sufficiently comprehensive to include bank notes and other choses in action. *Turner v. The State*, 422.
 8. Where the indictment avers an actual stealing of bank notes, the intent to steal named in the statute is necessarily included, as well as the knowledge that they were such. *Ib.* 422.
 9. In such case, if the indictment contains a particular description of the bank notes taken, but erroneously avers them to be "money, goods, and chattels," these words may be rejected as surplusage, and the count will be good. *Ib.* 422.
 10. Where an offense forms but one transaction, and the indictment containing several counts on which the jury have returned a verdict of guilty, it is error in the court to sentence on each count separately. *Woodford v. The State*, 428.

INDORSER. See BILLS OF EXCHANGE.

INFANTS—

1. In chancery proceedings, where it appears *affirmatively* that minor defendants have not been served with process, or otherwise legally notified, a decree, purporting to determine the rights of such minors, is void. *Moore v. Starks*, 369.
2. The appointment of a guardian *ad litem* for minor defendants, who have not been served with process, does not affect an appearance for them, nor give the court jurisdiction over them; but the appointment of a guardian *ad litem* is for the purpose of defense after appearance has been effected by service of process on the infants, or by publication. *Ib.* 369.
3. Where time begins to run against the ancestor it continues to run against the heir, although the latter is an infant. This is the universal rule in respect to the statute of limitations and the general rule in equity, when lapse of time is relied on as a bar. *Williams v. Presbyterian Society*, 478.

INFORMATION. See QUO WARRANTO.

INJUNCTION—

1. A court of chancery will not interfere to prevent a mere trespass, but where the injury threatened would be irreparable, or where, from some peculiar circumstances connected with the parties or the transaction, complete redress can not be had at law, a court of chancery is warranted in assuming jurisdiction. *Mechanics' and Traders' Bank v. Deboit*, 591.
2. A distrain by a treasurer against the money and property of an incorporated bank, for taxes assessed against it under the act of March 21, 1851, can not be enjoined in chancery. *Ib.* 591.
3. Where an injunction to stay the sale of any particular property by virtue of certain levies has been dissolved as to a part of the property only, and

Injunction—Judgment.

INJUNCTION—*Continued.*

continued as to the balance, and the property released not diminished in value in consequence of the injunction has been sold, and the proceeds of the sale applied on the judgments under which the levies had been made, no decree against the complainant should be rendered, on account of the dissolution of the injunction, for the amount of the judgment, penalty, etc. *Teaff v. Hewitt*, 511.

INJUNCTION BOND—

1. A mis-recital in the condition of such bond, as to the amount of the judgment enjoined by an injunction bill, may be corrected by the bill, where the injunction bond contains a plain reference to it, upon the principle that that is certain which can be made certain. *Williamson's Adm'r v. Hall*, 190.
2. Such reference for the purpose of construction makes the record referred to a part of the bond itself, and where the description and the proceeding described are both before the court, the latter will control the former. *Ib.* 190.

INTENT. See **CRIMES**.

INTENTION. See **REPEAL**.

INTEREST—

OF WITNESS.

1. Heir competent for the administrator. *Butt v. Butt*, 222.
2. Stockholder competent for the bank. *Lawson v. Salem Bank*, 206.
3. His interest goes to the credibility, not the competency of the witness. *Ib.* 206.

OF PARTIES.

1. Where the interests of two defendants are joint and inseparable, and the rights of one are saved by his disability, the saving inures for both. *Sturges v. Longworth*, 544.
2. The interest of a tenant in common is not such a joint and inseparable interest where his rights can be vindicated by his separate action. *Williams v. Presbyterian Society*, 478.
3. Where the court of common pleas proceeds to render a decree as to one of several defendants whose interests are inseparably connected, leaving the case as to such other defendants undisposed of, such decree is, so far as the right of appeal is concerned, a nullity, and can be set aside, by the court rendering the decree at a subsequent term, for irregularity. *Dougherty v. Walters*, 201.

FOR USE OF MONEY.

1. Note or obligation made in Connecticut on which more than six per centum is reserved void by the law of that state. *Palmer v. Yarrington*, 253.
2. Also void if more than six per centum is reserved or taken by a bank in Ohio. *Preble County Bank v. Russell*, 313.
3. But an error in calculation of interest or accidental omission of credit in the absence of any intent to take unlawful interest, does not render the security taken void. *Busby v. Finn*, 409.
4. And a contract untainted with usury when made, will not become void by a subsequent receipt of usurious interest upon it. *Ib.* 409.

JUDGMENT—

1. Where a contract infected with usury has been merged in a judgment, and a creditor's bill brought to obtain satisfaction, the parties to it are estopped, while it remains in force, from averring or proving such illegality to have existed in the obligation upon which it was founded, for the purpose of impeaching the judgment. *Stevens v. Bank of Wooster*, 233.
2. The remedy in such case can be had in a direct proceeding brought to set aside or impeach the judgment; by motion in the same court to

Judgment—Lapse of Time.

JUDGMENT—*Continued.*

- set it aside and let the party in to defend; or, under the circumstances of this case by original or cross bill in chancery, filed for that purpose. *Ib.* 233.
3. A judgment of a court of competent jurisdiction, rendered by consent of parties, will not be reversed on error. *Wells v. Martin*, 386.
 4. A judgment upon an usurious contract can not be collaterally impeached, and when made the consideration for another contract, such consideration is not void. So long as the judgment stands it estops the parties to deny the legality of the consideration. *Busby v. Finn*, 209.
 5. Where the court have passed separate sentences on the defendant on two counts of an indictment, on one of which counts he has been found guilty, and on the other of which he has been acquitted, and have made the sentence upon the count on which he was convicted to commence at the expiration of his term on the count on which he was not convicted, the whole judgment must be reversed. *Woodford v. The State*, 428.
 6. Where a judgment is reversed, for error, and remanded for further proceedings, the cause may be taken up by the court below at the point where the first error was committed, and be proceeded with, as in other cases, to final judgment. *Commissioners v. Carey*, 463.

JUDICIAL DECISIONS—

1. The decisions of the highest judicial tribunal in the state, in questions affecting rights of property which becomes valuable and changes hands upon the faith of such decisions, will not be disturbed without the most urgent necessity to prevent injustice or vindicate obvious principles of law. *Kearney v. Butties*, 362.
2. Under the judicial construction of the registry law of 1831, which has prevailed in this state for some years past, a mortgage which is not duly executed and delivered for record has no validity, either in law or equity, against a judgment lien. And although this is at variance with the former analogies of the law, yet inasmuch as it has become a rule of property in settling priorities among creditors, the court, acting upon the maxim *stare decisis*, which is a safe and established rule of judicial policy, will not disturb it. *White v. Denman*, 116.

JURISDICTION IN EQUITY. See EQUITY; JURISDICTION.

1. The jurisdiction of the district court in error in criminal cases dependent upon the allowance of the writ. *Semble. Faris v. The State*, 188.
2. The legislature can not confer jurisdiction on the supreme court by providing for an appeal from the decision of an executive officer. *Logan Branch Bank Exparte*, 432.

JURY—

It is not error to excuse a struck juror from serving, for good cause shown; and that he is a postmaster is a good cause. *Stewart v. The State*, 66.

See VERDICT.

LAPSE OF TIME—

1. Where time begins to run against the ancestor, it continues to run against the heir, although the latter is an infant. This is the general rule in equity, when lapse of time is relied on as a bar. *Williams v. Presbyterian Society*, 478.
2. Lapse of time appearing by the bill may be taken advantage of upon demurrer. *Ib.* 478.
3. There are cases of fraud that render the defense of time unavailable; as where a person has been misled by the misrepresentations or practice of his adversary, or kept in ignorance of his rights by one who ought to have disclosed them; but such fraud must be specially averred. The general averment of combination and confederacy is insufficient, even upon demurrer. *Ib.* 478.

Legislature—License.

LAPSE OF TIME—*Continued.*

See TRUSTS AND TRUSTEES, 11.

LEGISLATURE—

1. The general assembly, like the other departments of government, exercises only delegated authority; and any act passed by it not falling fairly within the scope of "legislative authority," is clearly void, as though expressly prohibited. *C. W. & Zanesville R. R. Co. v. Commissioners of Clinton County*, 77.
2. The power of the general assembly to pass laws can not be delegated by them to any other body or to the people. *Ib.* 77.
3. An act of the general assembly authorizing the trustees of a township, through which a railroad was to be made, to subscribe on behalf of the township, to the capital stock of the railroad company, is not in conflict with the constitution of 1802. *Steubenville & Indiana Railroad Company v. Trustees North Township*, 105.
4. A discriminating assessment by the city council of Cleveland under their charter, for the improvement of streets, laid upon grounds immediately benefited in proportion to such benefit, was a legitimate exercise of the taxing power under the constitution of 1802; nor is the same opposed to section 4, article 8, of that instrument, providing for the inviolability of private contracts. *Scovill v. Cleveland*, 126.
5. The power of taxation, being a sovereign power, can only be exercised by the general assembly when, and as conferred by, the constitution; and by municipal corporations only when unequivocally delegated to them by the legislative body. *Mays v. Cincinnati*, 268.
6. When the legislature has erected a new county out of territory formerly belonging to other counties, and to compensate such counties for the loss of territory occasioned by the erection of the new county, has added territory to them from adjoining counties, it is competent for the legislature to provide that the county receiving the accession of territory shall pay an equitable proportion of the indebtedness of the county from which such territory has been taken; and the provision of the statute creating the county of Auglaize, which requires Allen county to pay a portion of the debts of Putnam county, is valid. *Commissioners of Putnam v. Auditor of Allen*, 323.
7. The legislature will not be considered as having undertaken to surrender the taxing power of the state, in the absence of express words to that effect. *Knoup v. Piqua Bank*, 603.

See CONSTITUTIONAL LAW; CORPORATIONS, 10, 11; TAXES, 1, 2, 3; REPEAL, 4, 5; LEVY; INJUNCTION.

LEX LOCI—

The validity of a note made in Connecticut is to be determined by the laws of that state; if void there, it is void here. *Palmer v. Yarrington*, 253.

LICENSE—

1. A license to keep a tavern, under the authority of the act granting licenses and regulating taverns, passed June 1, 1831, was a license, according to the true intent and meaning of said act, to retail liquors as well as to keep a tavern. *Hirn v. The State*, 15.
2. The act to restrain the sale of spirituous liquors, of March, 1851, did, by its operation, repeal the act of June, 1831, so far as it conferred the authority to grant licenses in future to retail liquor, but did not, by any express language, revoke or annul the outstanding licenses which had been granted under the act of 1831, and had not expired at the time the former act took effect. *Ib.* 15.
3. The sum demanded for license to pursue an employment, when used as a means of supplying the public treasury, is a tax upon such employment. *Mays v. Cincinnati*, 268.

 Lien—Limitations, Statute of.

LICENSE—*Continued.*

4. The city council of Cincinnati have no power to levy such a tax. *Ib.* 286.
5. Money paid to procure license, when issued upon the petition of the party, without objection or protest, is, in the legal sense, a voluntary payment, and can not be recovered back. *Ib.* 268.

LIEN—

1. By the provisions of the "act to incorporate the State Bank of Ohio, and other banking companies" (43 Ohio L. 24), a bank holds a lien on the shares of its stockholder for the amount of his indebtedness to it, which can not be defeated by a transfer made without the consent of a majority of the directors, nor will such consent authorize a transfer if the debt is overdue and unpaid. *Conant v. Seneca Co. Bank*, 298.
 2. Although an assignment on the books of the bank may be necessary to pass a legal title to stock, yet an equitable title may be otherwise conveyed; and the bank is bound to respect such equity from the time it receives notice of it. Hence, debts contracted by the assignor to the bank, after the receipt of such notice, are not, as against the assignee, liens upon the stock. *Ib.* 298.
 3. Notice of such assignment to the cashier is notice to the bank. *Ib.* 298.
 4. Although a debt is void, yet if it be paid, a creditor at large of the payer can not reach the money or property with which it is paid; such creditor having no lien upon, or specific interest in such money or property at the time of payment. *Ib.* 298.
 5. Upon the decease of a debtor, his estate, real and personal, by law, stands for the payment of his general creditors alike, and one creditor can not by superior diligence acquire a superior right to such estate. *M Donald v. Aten*, 293.
 6. H mortgaged land to T., and afterwards sold it to O., and received payment. H. informed T. of the sale, and in order to remove the incumbrance, as he was bound to do by his contract with O., he proposed to give a new note for the debt, with a mortgage on other real estate to secure it, to which T. consented, and the new note and mortgage were accordingly executed and delivered: T. agreeing not to prosecute the first mortgage, if the property covered by the second was amply sufficient, but T. neglected for sixteen months to deliver the second mortgage for record, by means whereof the property (which was amply sufficient) was swept away under other mortgages and conveyances made by H. within that period. Held, that under these circumstances, O's land was discharged from the lien of the first mortgage. *Teaff v. Ross*, 469.
 7. Under the act of March 16, 1838 (Swan's Statutes, 208), a mortgage lien is perfected by delivering the mortgage for record to the Recorder of the proper county. *Brown v. Kirkman*, 116.
 8. Such lien is not defeated, as to a subsequent incumbrancer with notice in fact, by a mistake of the Recorder in making the record. *Ib.* 116.
- See MORTGAGE, 1, 2, 3.

LIFE ESTATE. See TENANT FOR LIFE.

LIMITATIONS, STATUTE OF—

1. Where time begins to run against the ancestor, it continues to run against the heir, although the latter is an infant. This is the universal rule in respect to the statute of limitations, and the general rule in equity, when lapse of time is relied on as a bar. *Williams v. Presbyterian Society*, 478.
2. A tenant in common whose rights may be vindicated by his separate action, is not protected against the statute of limitations, or lapse of time, by a disability of his co-tenant. *Ib.* 478.
3. The right of a county or town to property dedicated to public use may

Limitations, Statute of—Mandamus.

LIMITATIONS, STATUTE OF—Continued.

be barred by the statute of limitations, or lost by the lapse of time. *Ib.* 478.

4. So may a right of the dedicators to enforce a specific execution of the purposes of the dedication. *Ib.* 478.
5. Where the interests of two defendants are joint and inseparable, and the rights of one are saved under the provision of the statute of limitations, on account of his disability, such saving inures to the benefit of the other defendant, although laboring under no disability. *Sturges v. Longworth*, 544.

See LAPSE OF TIME.

LIS PENDENS—

Whether purchaser of land situate in one county is chargeable with notice of a judicial proceeding with reference to the land pending in another county. *Dougherty v. Walters*, 201.

LOSS OF WRITINGS—

1. The affidavit of a party to a suit may be received to prove the loss of a writing, in order to let in secondary evidence of its contents. *Wells v. Martin*, 386.
2. The fact of loss is to be established to the satisfaction of the court, not conclusively, for that is not required, but reasonably. To do this may, in some cases, where there is more than one party on the side offering the testimony, require the affidavits of all of them. In other cases, an affidavit of one of them may be sufficient. No general rule can be laid down upon the subject. The ruling must depend upon the circumstances of each case. *Ib.* 386.

LUNATIC—

1. The statute authorizing non-resident defendants to be brought into court by publication in a newspaper, refers as well to lunatic defendants as to sane persons. *Sturges v. Longworth*, 544.
2. Where a lunatic defendant is a non-resident of the state, and has been brought into court by publication, it is competent for the court to appoint a guardian *ad litem* to defend the suit, although such guardian *ad litem* may not have been appointed the general guardian, or committee of the lunatic. *Ib.* 544.
3. It is error for the court to decree against a lunatic, without an answer from his guardian *ad litem*. *Ib.* 544.
4. When a decree is taken, as on petition confessed, against a lunatic and his guardian *ad litem*, as in default for answer, plea, or demurrer, even if the court has heard evidence as to the complainant's claim, it would not have cured the error: such evidence would be heard out of time. *Ib.* 544.

MACHINERY—

The machinery in a woollen factory, consisting of carding machines, spinning machines, power looms, etc., connected with the motive power of the steam engine by bands and straps, but in no wise attached to the building in which used, except by cleats, or other means to confine them to their proper places for use, and subject to removal whenever convenience or business may require without injury, are not fixtures, but chattel property. *Teaff v. Hewitt*, 541.

See FIXTURES.

MANDAMUS—

1. A lawful discretion, vested in an individual, officer, or corporation, can not be destroyed or limited by the writ of mandamus. *Ex-parte David A. Black*, 30.
2. It is equally well settled that, before the writ will be issued to either, a plain dereliction of duty must be established. *Ib.* 30.

Mandamus—Mistake.

MANDAMUS—Continued.

3. A majority of the electors of Clinton county having decided, in virtue of an act of assembly, in favor of a subscription to the stock of a railroad company, and the same having actually been made before the adoption of the constitution of 1851, and the commissioners having elected, in pursuance of said act, to deliver the bonds of the county to the company in payment of the subscription, and having become bound to do so, and afterwards refusing upon demand to deliver them, and showing no cause for such refusal except that the act aforesaid was of doubtful constitutionality, a writ of mandamus is the proper remedy to enforce the delivery. *C. W. & Z. Railroad Company v. Comm. of Clinton County*, 77.
4. This writ lies in all cases where the relator has a clear legal right to the performance of some official or corporate act by a public officer or corporation, and no other adequate, specific remedy. *Ib.* 77.
5. Where authority is conferred upon a public officer, to be exercised at his discretion, and where no act has been done by him under such authority, and no private rights have intervened, the courts can not compel him, by mandamus, to exercise such discretionary power. *Rollersville Road v. Comm. of Sandusky County*, 149.
6. Mandamus will not lie to compel the auditor of a county to draw an order on the treasurer of the county where the auditor has not the right to fix the amount to be drawn for, unless such amount has been ascertained and liquidated. *Commissioners of Putnam v. Auditor of Allen*, 322.

MARRIED WOMEN. See HUSBAND AND WIFE.

MILL. See FIXTURES.

MINING COMPANY—

1. A. paid money into the treasury of a California mining company to entitle B. to membership therein, upon agreement that A. "should have a full half share of all B. is entitled to by being a member of said company." *Scott v. Clark*, 382.
2. A. may recover only the one-half of the net proceeds of the share assigned to B. upon the dissolution of said company. *Ib.* 382.
3. B. is entitled to deduction therefrom of a reasonable amount to cover expenses of his return from California. *Ib.* 382.
4. Under the constitution of the company, the same might be dissolved at any time by vote of two-thirds of its members. *Ib.* 382.
5. The acquisitions of B., whilst in California, subsequently to the dissolution of the company, were his individual property, and A. had no interest therein. *Ib.* 382.

MINOR. See INFANT.

MISTAKE—

1. The court will not consider the question whether relief can be granted in chancery on the ground of mistake without the requisite allegations in the bill, to bring the party within the rule of equitable relief under this head of equity jurisdiction. *White v. Denman*, 110.
2. The lien of a mortgage delivered to the recorder for record, is not defeated, as to a subsequent incumbrancer with notice in fact, by a mistake of the recorder in making the record. *Brown v. Kirkman*, 116.
3. A mis-recital in the condition of an injunction bond, as to the amount of the judgment enjoined by an injunction bill, may be corrected by the bill, where the injunction bond contains a plain reference to it, upon the principle that that is certain which can be made certain. *Williamson's Adm'r v. Hall*, 190.
4. Such reference for the purpose of construction, makes the record referred to a part of the bond itself, and where the description and the proceeding described are both before the court, the latter will control the former. *Ib.* 190.

Mistake—Notice.

MISTAKE—Continued.

5. Where a deed was evidently designed to convey a fee, a court of equity will not lend itself to defeat the intent. If it would be reformed in equity, no person who would be bound by it when reformed, can found an equity upon its defects. *Williams v. Presbyterian Society*, 478.

MORTGAGE—

1. Where the owner of a certificate of the entry of land from the United States assigns such certificate as security for a debt, with a condition of defeasance, on the payment of the debt, such assignment creates an equitable mortgage on the land covered by such certificate. *Stover v. Bounds*, 107.
2. Where the assignee of such certificate sells the same to a person who has notice of the terms on which it was first assigned, such subsequent assignee will hold the same subject to the right of the original assignor to redeem. *Ib.* 107.
3. The right of the original assignor to redeem will not be affected by a provision in the condition of defeasance that his right to redeem is limited to a fixed time after the transaction. Once a mortgage, always a mortgage. *Ib.* 107.
4. Under the judicial construction of the registry law of 1831, which has prevailed in this state for some years past, a mortgage which is not duly executed and delivered for record has no validity, either in law or equity, against a judgment lien. And although this is at variance with the former analogies of the law, yet inasmuch as it has become a rule of property in settling priorities among creditors, the court, acting upon the maxim *stare decisis*, which is a safe and established rule of judicial policy, will not disturb it. *White v. Denman*, 110.
5. Where a mortgage is defective in its execution by having the name of but one witness subscribed to the attestation clause, the official signature of the justice of the peace to his certificate of acknowledgment will not, under the statute, answer a double purpose and supply the deficiency in the attestation. *Ib.* 110.
6. Under the act of March 16, 1838 (Swan's Stat. 268), a mortgage lien is perfected by delivering the mortgage for record to the recorder of the proper county. *Brown v. Kirkman*, 116.
7. Such lien is not defeated, as to a subsequent incumbrancer with notice in fact, by a mistake of the recorder in making the record. *Ib.* 116.
8. A proceeding to foreclose a mortgage on real estate, although in the nature of a proceeding *in rem*, is still an adversary proceeding, in which the right of the mortgagor is to be passed upon, and before the court can proceed it must have jurisdiction of the person as well as the land. *Moore v. Stark*, 369.

See LIEN, 6.

NOBLE COUNTY—

The act to erect the county of Noble, passed March 11, 1851, is not inconsistent with the present constitution of the state, nor repealed by it. *Evans v. Dudley*, 437.

NOTICE—

1. The general rule is that a person is not chargeable with notice of an adversary title, in the absence of proof, but that he is bound to know the defects apparent upon his own title papers, and is required to take notice of the recitals in the chain of deeds or other muniments under which he claims. *Beardsley v. Chapman*, 118.
2. Where a bill was protested in the city of Pittsburgh, on the 27th of July, and the departure of the only mail of the next day to the place of the residence of the indorser was ten o'clock, A. M., the time of the closing of the mail being ten minutes after nine o'clock, and not before convenient early

 Notice—Office and Officers.

NOTICE—*Continued.*

business hours, the holder does not use due diligence if he neglects to send the notice of dishonor by that mail. *Lawson v. Salem Bank*, 206.

3. The holder of a bill is not bound to give notice of the dishonor to any more than his first immediate indorser. And each party to a bill has the same time for giving notice to parties prior to him that the holder has. *Ib.* 206.
 4. After an agent, to whom a bill is sent for collection, has given notice to the principal, the same time thereafter is allowed to the principal for giving notice to the indorser as if he had himself been an indorser receiving notice from the holder. *Ib.* 206.
 5. Notice to the cashier of a bank, of an assignment of shares in its stock, is notice to the bank. *Conant v. Seneca Co. Bank*, 298.
 6. Notice in fact of a prior mortgage, which is erroneously recorded. *Brown v. Kirkman*, 116.
- See MORTGAGE, 2; BILL OF EXCHANGE, 3.

OCCUPYING CLAIMANTS—

1. The words "by a deed duly authenticated and recorded," in the occupying claimant law, mean a deed to the person under whom the occupant claims, and not a deed to the occupant himself. The contrary construction in *Glick v. Gregg* (17 Ohio, 57), is overruled. *Beardsley v. Chapman*, 118.
2. A tenant for life, obtaining his title and possession with knowledge of the quantity of his estate, is not entitled to the benefit of said statute against the reversioner or remainderman. *Ib.* 118.
3. And the provision in the act requiring a deed duly authenticated and recorded to the occupant's grantor, must mean a deed apparently conveying an estate which, when transmitted to the occupant, will justify him in making lasting and valuable improvements, and demanding payment for them before yielding possession. *Ib.* 118.
4. The statute is intended for the relief of those who act in good faith. It was not designed to enable a man, by an act of bad faith, to make another his debtor. *Ib.* 118.
5. The general rule is, that a person is not chargeable with notice of an adversary title in the absence of proof, but that he is bound to know the defects apparent upon his own title papers, and is required to take notice of the recitals in the chain of deeds or other muniments under which he claims. *Ib.* 118.
6. Without deciding how far this doctrine is applicable to a person seeking the benefit of the occupying claimant law, there is no difficulty in holding that he is not to be presumed to know any defects or recitals that do not appear upon the muniments which are necessary to establish his claim under that act. Thus, in a case like the present, he will not be presumed to know recitals in deeds prior to the deed to his grantor. *Ib.* 118.
7. If a recital in that or his own deed expressly shows an adverse claim to the lands, the occupant will be held to have notice of such claim. But if it only shows that the premises once belonged to a third person, such recital will not defeat the occupant's claim to the benefit of the act. *Ib.* 118.
8. This court may review on certiorari a decision of an inferior court, on a motion to set aside the verdict of a jury, under said statute, though the motion was based on matter of fact—the testimony being set out in the bill of exceptions. *Ib.* 118.
9. When the jury find a balance in favor of the occupant, he is entitled to a judgment for costs, but not for said balance. *Ib.* 118.

OFFICE AND OFFICERS—

1. A lawful discretion, vested in an individual, officer, or corporation, can

Office and Officers—Payment.

OFFICE AND OFFICERS—Continued.

- not be destroyed or limited by writ of *mandamus*. *Ex parte David A. Black*, 30.
2. It is equally well settled that before the writ will be issued to either, a plain dereliction of duty must be established. *Ib.* 30.
 3. The proceedings of members of a city council continuing to act as such *de facto*, although, by legislation subsequent to their election, thrown out of the wards for which they were elected, are valid. *Scoville v. Cleveland*, 126.
 4. *Mandamus* will not lie to compel the auditor of a county to draw an order on the treasurer of the county, where the auditor has not the right to fix the amount to be drawn for, unless such amount has been ascertained and liquidated. *Commrs of Putnam v. Auditor of Allen*, 322.
 5. Where the auditor has not the power to fix the sum for which the county is to be chargeable, he can not, by any admission in a proceeding by *mandamus*, bind the county in reference to the amount of liability. *Ib.* 322.
 6. Where the duties of an office are specified and limited in their character, and not continuous during the year, an annual salary prescribed by law as the compensation will be payable and apportioned with reference to the duties performed, and not to the lapse of time. *Lawrence ex parte*, 431.

See COMMISSIONERS OF COUNTY; TRUSTEES OF TOWNSHIPS; REPORTER; TREASURER.

PARTIES—

1. IN EQUITY. See EQUITY.

2. AT LAW.

1. To action at law, called as witnesses, the objection to their competency is waived, and they become competent as witnesses on the trial for all purposes. *Legg v. Drake*, 286.
2. The principal in a note, sued jointly with his sureties, who suffers a default, and against whom a separate judgment is entered, is a competent witness for such sureties upon the issue joined between them and the plaintiff. *Preble Branch Bank v. Russell*, 313.
3. The affidavit of a party to a suit may be received to prove the loss of a writing, in order to let in secondary evidence of its contents. *Wells v. Martin*, 386.
4. The fact of loss is to be established to the satisfaction of the court, not conclusively, for that is not required, but reasonably. To do this may, in some cases, where there is more than one party on the side offering the testimony, require the affidavits of all of them. In other cases, an affidavit of one of them may be sufficient. No general rule can be laid down upon the subject. The ruling must depend upon the circumstances of each case. *Ib.* 386.
5. A wife who, by gross abuse of her husband has been driven beyond the pale of his protection, and a separation *de facto* exists, she living and maintaining herself as a single woman, and having had specific property decreed to her as alimony, may maintain an action at law in regard to such property without the joinder of her husband, although no divorce has been decreed. *Benadum v. Pratt*, 403.

PAYMENT—

1. Money paid voluntarily can not be recovered back. *Mays v. Cincinnati*, 268.
2. Money paid to procure license, when issued upon the petition of the party, without objection or protest, is, in the legal sense, a voluntary payment, and can not be recovered back. *Ib.* 268.
3. To make the payment of an illegal demand involuntary, it must be made to appear that it was made to release the person or property of the party from detention, or to prevent a seizure of either by the other party having

 Payment—Practice.

PAYMENT—*Continued.*

apparent authority to do so without resorting to an action at law. *Ib.* 268.

PLEADING—

1. EQUITY PLEADING. See EQUITY.

2. CRIMINAL. See INDICTMENT.

3. AT LAW.

DECLARATION.

1. A misrecital in the condition of an injunction bond, as to the amount of the judgment enjoined by an injunction bill, may be corrected by the bill, where the injunction bond contains a plain reference to it, upon the principle that that is certain which can be made certain. *Williamson's Adm'r v. Hall*, 190.
2. Such reference, for the purpose of construction makes the record referred to a part of the bond itself, and where the description and the proceeding described are both before the court, the latter will control the former. *Ib.* 190.
3. A declaration filed under the act of 1816, to prohibit the issuing and circulating of unauthorized bank paper (Swan, 136), is sufficient, if it contains the requisites prescribed in the thirteenth section of that act. *Kearney v. Buttes*, 362.
4. It is sufficient, in such declaration, to aver that the defendant was a stockholder at the dates of the notes, or subsequently, without showing him such at the commencement of the suits. *Ib.* 362.

PLEAS.

5. Where a condition to perform a specified act, as to convey land, is declared on, a plea of general performance of the covenants is insufficient. A special performance must be pleaded. *Taylor v. Browder*, 225.
6. A plea of tender of a deed should either set out the deed in the plea, or make profert of it. *Ib.* 225.
7. Under the plea of non-assumpsit, without affidavit, a defendant may give evidence to disprove the execution of the note on which suit is brought. *Palmer v. Yarrington*, 253.

POWERS—

1. The words, "I hereby give J. W. Abell the liberty of making use of my name, if it will be of any use to him with his friends in Connecticut, to the amount of one thousand or fifteen hundred dollars, to borrow money. N. W. Palmer," are not a mere guaranty for the amount named, but confer a power upon J. W. Abell to sign the name of Palmer to a note for the money borrowed. *Palmer v. Yarrington*, 253.
2. Such power does not authorize a loan by J. W. Abell, as agent, to or for the use of any other person. *Ib.* 253.

PRACTICE—1. IN EQUITY. See EQUITY. 2. AT LAW.

1. Where a usurious contract has been merged in a judgment, and a creditor's bill brought to obtain satisfaction, the parties to it are estopped, while it remains in force, from averring or proving such illegality to have existed in the obligation upon which it was founded, for the purpose of impeaching the judgment. *Stevens v. Bank of Wooster*, 233.
2. The remedy in such case can be had in a direct proceeding brought to set aside or impeach the judgment; by motion in the same court to set it aside and let the party in to defend; or, under the circumstances of this case, by original or cross bill in chancery, filed for that purpose. *Ib.* 233.
3. Under the plea of non-assumpsit, without affidavit, a defendant may give evidence to disprove the execution of the note on which suit is brought. *Palmer v. Yarrington*, 253.
4. No action will lie by obligee against obligor on a bond, the consideration

Practice.

PRACTICE—*Continued.*

- of which is a sale made by the former to the latter to defraud creditors; both of them having been guilty of the fraudulent intent. *Goudy v. Gebhart*, 262.
5. In such a case, the proof of the fraud may come from the defendant. The rule is, that no one is allowed to set up his own iniquity to defeat an innocent person. But where the parties are *particeps criminis*, the fraud may be proved by the defendant. *Ib.* 262.
 6. It is irregular to return the original files in a criminal case, instead of a transcript with a writ of error. The statute authorizing the original papers to be sent up, relates to civil causes only. *Farris v. The State*, 188.
 7. Whether a writ of error in a civil cause issues as of course. Query. *Ib.* 188.
 8. The law making it the duty of the court of common pleas, at the time of the rendition of the judgment or decree in certain cases, to ascertain and fix the penalty of the appeal bond, to be given in the event of an appeal, requires this act to be performed by that court without the motion of either party in the cause. *Hubble v. Renick*, 171.
 9. A motion to dismiss an appeal will be in time if made during the term at which the appeal is entered, and before judgment. *Ib.* 171.
 10. Where the parties have waived the intervention of a jury, and submitted the trial of a civil cause upon its merits to the judges of the district court, the facts should be found by the court, or ascertained by an agreed statement between the parties before the case can be regularly reserved for decision by this court, on the legal questions arising upon the merits. *Ib.* 171.
 14. In the argument of a cause before the court or jury, counsel has a right, *by way of argument or illustration*, either to read from a book a pertinent quotation or extract from a work on science or art, or other publication, adopting it and making it a part of his own address to the jury, but not using it as evidence in the case. *Legg v. Drake*, 286.
 15. A judgment will not be reversed on error, for the action of the court below in regard to a matter resting within its discretion. *Ib.* 286.
 16. Where a party to an action is called upon and introduced as a witness on the trial, by the adverse party, under the act of March, 1850, to improve the law of evidence, the objection to his competency is waived, and he becomes competent as a witness on the trial for all purposes. *Ib.* 286.
 17. When a witness is produced and examined by a party in an action, even though he be interested to testify against the party calling him, the other party is not limited, in his cross-examination, to the subject-matter of the examination in chief, but may cross-examine him as to all matters pertinent to the issue on trial; limited, however, by the rule, that a party can not, before the time of opening his own case, introduce his distinct grounds of defence or avoidance by the cross-examination of his adversary's witnesses. *Ib.* 286.
 18. When the cross-examination is extended to topics disconnected with the particular facts disclosed in the direct examination, leading questions to the witness may be proper or improper, according to circumstances, and the control of this must rest within the discretion of the court. *Ib.* 286.
 19. The principal in a note, sued jointly with his sureties, who suffers a default and against whom a separate judgment is entered, is a competent witness for such sureties, upon the issue joined between them and the plaintiff. *Preble Branch Bank v. Russell*, 313.
 20. The 9th section of the act of Feb. 24, 1848 (46 O. L., 91), suspended the right to make the defence of usury, but allowed an action against the Bank to recover the money for the use of schools. The repeal of this law in 1850 restored the right to defend. *Ib.* 313.
 21. The law of 1848 only operated upon the remedy, still leaving the contract void and expressly forfeited; and consequently its subsequent re-

Practice—Principal and Surety.

PRACTICE—Continued.

- peal, and the revival of the right to defend, did not in any manner affect or impair any provision of a valid contract. *Ib.* 313.
22. The act of April 30, 1852, makes applicable to the courts under the present constitution the remedies provided by the act of March 12, 1845, "to regulate the practice of the judicial courts." *Shepler v. Dewey*, 331.
23. The issuing of a writ of error, under the sixth section of the act of March 12, 1845, is not inconsistent with the legislation under the present constitution, and may be done as of course. *Ib.* 331.
24. To authorize the district court to reserve a cause, and send it to the supreme court for decision, on account of the character of the questions which arise in the case, the questions should be such as require the decision of the court of dernier resort, and not such as are well settled and of familiar application. *Jenkins v. Pearson*, 381.
25. To make a paper a part of a bill of exceptions it must be incorporated in it, or attached to it, or filed with it, and so described as to leave no doubt of its identity. When not so made a part of the bill, the defect is not cured by a journal entry directing it to be taken as a part thereof. *Busby v. Finn*, 209.
26. A bill of exceptions must be signed and sealed at the term at which the exception is taken, and it can not be amended after that term. A *nunc pro tunc* order made at a subsequent term, to the effect that a paper not identified by the bill shall be considered as a part of it, is a nullity. *Ib.* 209.
27. An erroneous admission of testimony on a trial by jury is of no moment, if the jury be afterwards, by consent of the parties, discharged without rendering a verdict. *Wells v. Martin*, 386.
28. The affidavit of a party to a suit may be received to prove the loss of a writing, in order to let in secondary evidence of its contents. *Ib.* 386.
29. The fact of loss is to be established to the satisfaction of the court, not conclusively, for that is not required, but reasonably. To do this may, in some cases, where there is more than one party on the side offering the testimony, require the affidavits of all of them. In other cases, an affidavit of one of them may be sufficient. No general rule can be laid down upon the subject. The ruling must depend upon the circumstances of each case. *Ib.* 386.
30. It is a rule in equity, as well as at law, that if a pleading admits of either of several constructions equally well, that construction is to be adopted which is least favorable to the pleader. *Williams v. Presbyterian Society*, 478.

See APPEAL; ERROR; EVIDENCE.

PRINCIPAL AND AGENT—

1. The words "I hereby give J. W. Abell the liberty of making use of my name, if it will be of any use to him with his friends in Connecticut, to the amount of one thousand or fifteen hundred dollars, to borrow money. N. W. Palmer," are not a mere guaranty for the amount named, but confer a power upon J. W. Abell to sign the name of Palmer to a note for the money borrowed. *Palmer v. Yarrington*, 253.
2. Such power does not authorize a loan by J. W. Abell, as agent, to or for the use of any other person. *Ib.* 253.
3. After an agent to whom a bill is sent for collection has given notice of dishonor to the principal, the same time thereafter is allowed to the principal for giving notice to the indorser as if he had himself been an indorser receiving notice from the holder. *Lawson v. Salem Bank*, 266.
4. Notice to the cashier of a bank, of an assignment of shares in its stock, is notice to the bank. *Conant v. Seneca Co. Bank*, 298.

PRINCIPAL AND SURETY—

1. The contract of a surety upon an injunction bond is within the statute of

Principal and Surety—Recognizance.

PRINCIPAL AND SURETY—*Continued.*

- frauds, and to be strictly construed, and no parol evidence is admissible to add to, vary, or contradict it in any of its terms. *Williamson's Adm'r v. Hall*, 190.
2. The principal in a note, sued jointly with his sureties, who suffers a default, and against whom a separate judgment is entered, is a competent witness for such sureties, upon the issue joined between them and the plaintiff. *Preble Branch Bank v. Russell*, 313.
3. The right of contribution among sureties is founded, not in the contract of suretyship, but is the result of a general equity which equalizes burdens and benefits; and the common law, which has adopted and given effect to this equitable principle, by an action upon an implied assumpsit, only allows the action where there is a just and equitable ground for contribution. *Russell v. Faylor*, 327.
4. Where a surety has voluntarily paid money on a void note or obligation, he can not maintain an action against his co-surety for contribution. *Ib.* 327.

PROMISSORY NOTE. See BILL OF EXCHANGE.

PUBLIC BUILDINGS—

1. The right to determine when a court-house, jail, and public offices shall be erected by a county, is vested in its commissioners. They must provide a court-room, jail, and offices; but they need not be buildings erected expressly for the purpose. *Ex parte Black*, 30.
2. The act of January 28, 1851, does not limit the discretion of the commissioners of Hamilton county in these particulars. *Ib.* 30.
3. Nor are they deprived of their discretion by the contract made by and between them and the contractors for the building of a particular court-house and jail. *Ib.* 30.

QUO WARRANTO—

Form of information for intrusion into office. *Evans v. Dudley*, 437.

RAILWAY COMPANIES—

1. Shares in railroad companies are personal property, whether the companies are or are not subject to the provisions of the "act regulating railroad companies," passed February 11, 1848. *Johns v. Johns*, 350.
2. Subscriptions by counties to capital stock of railways, constitutional, under constitution of 1802. *C. W. & Z. R. R. v. Comm'rs of Clinton Co.*, 77.
3. Subscriptions by townships, also. *Steubenville & Indiana R. R. v. North Township*.

RECITAL—

1. A mis-recital in the condition of an injunction bond, as to the amount of the judgment enjoined by an injunction bill, may be corrected by the bill, where the injunction bond contains a plain reference to it, upon the principle that that is certain which can be made certain. *Williamson's Adm'r v. Hall*, 190.
2. Such reference for the purpose of construction makes the record referred to a part of the bond itself, and where the description and the proceeding described are both before the court, the latter will control the former. *Ib.* 190.
3. A person is required to take notice of the recitals in the chain of deeds or other muniments under which he claims. *Beardsley v. Chapman*, 118.

RECOGNIZANCE—

1. A recognizance, which is an obligation of record entered into before some court of record or magistrate duly authorized, subject to a condition to do some particular act, is invalid unless it contain all the essential parts, both of the obligation and the condition; and none of the material parts of either can be supplied by oral testimony. *Ohio v. Crippen*, 399.

 Recognizance—Reporter.

RECOGNIZANCE—*Continued.*

2. The third section of the act of February 25, 1848, providing that "it shall not be necessary to enter upon the journal of the court any recognizance which shall be taken during the session of the same; but that every such recognizance shall be deemed valid in law, if taken in open court, and attested by the clerk of such court," does not dispense with a writing setting forth the essential requisites of a recognizance. *Ib.* 399.
3. A mere memorandum of the clerk of the court, on a loose sheet of paper, setting forth that a recognizance had been entered into in open court by the parties thereto, but not setting out all the material parts, is invalid as a recognizance. *Ib.* 399.

RECORD—

1. The mistake of a recorder in making the record of a mortgage, does not defeat the lien of the mortgage as against a subsequent incumbrancer, with notice in fact. *Brown v. Kirkman*, 116.
2. It is irregular to return the original files in a criminal case, instead of a transcript with a writ of error. The statute authorizing the original papers to be sent up relates to civil causes only. *Farris v. The State*, 188.
3. A mis-recital in the condition of an injunction bond, as to the amount of the judgment enjoined by an injunction bill, may be corrected by the bill, where the injunction bond contains a plain reference to it, upon the principle that that is certain which can be made certain. *Williamson's Adm'r v. Hall*, 190.
4. Such reference for the purpose of construction makes the record referred to a part of the bond itself, and where the description and the proceeding described are both before the court, the latter will control the former. *Ib.* 190.
5. A recognizance, which is an obligation of record entered into before some court of record or magistrate duly authorized, subject to a condition to do some particular act, is invalid unless it contain all the essential parts, both of the obligation and the condition; and none of the material parts of either can be supplied by oral testimony. *Ohio v. Crippen*, 399.

See TOWN PLAT.

REPEAL—

1. A tax, regularly assessed under the act of March 21, 1851, to tax banks, and bank and other stocks the same as other property, is not remitted by the repealing clause of the act of 13th April, 1852, for the assessment and taxation of all property in this state, and for levying taxes thereon according to its true value in money. *Debolt v. Trust Company*, 563.
2. The remedy, by bill in chancery, provided by the first-named act, for the collection of taxes assessed against the Ohio Life Insurance and Trust Company, and re-enacted in the last, may be resorted to for the collection of taxes assessed in 1851, and remaining unpaid after the passage of the act of 1852. *Ib.* 563.
3. Where a statutory remedy, for a right created by that statute, is repealed, but the repealing statute provides a substantially similar remedy, the right may be prosecuted under the repealing statute. *Knoup v. Piqua Bank*, 603.
4. The legislative power includes as well the power to amend and repeal existing laws, as the power to enact laws. And the legislature is incompetent to make any contract or arrangement whereby the legislative power can be, to any extent, surrendered or abridged. *Bond v. Toledo Bank*, 622.
5. Repeal by force of the adoption of the constitution of 1851. *Evans v. Dudley*, 441.

REPORTER—

1. Where the duties of an office are specified and limited in their char-

Reporter—Statutes Examined, etc.

REPORTER—*Continued.*

- acter, and not continuous during the year, an annual salary prescribed by law, as the compensation, will be payable and apportioned with reference to the duties performed, and not to the lapse of time. *Lawrence ex parte*, 436.
2. The present supreme court being a distinct tribunal from the late supreme court in bank, and its successor only as to pending causes, the reporter of the former is not the successor of the reporter of the latter. *Ib.* 436.

RESERVATION—

1. Where the parties have waived the intervention of a jury, and submitted the trial of a civil cause upon its merits to the judges of the district court, the facts should be found by the court, or ascertained by an agreed statement between the parties before the case can be regularly reserved for decision by this court, on the legal questions arising upon the merits. *Hubble v. Renick*, 171.
2. To authorize the district court to reserve a cause, and send it to the supreme court for decision, on account of the character of the questions which arise in the case, the questions should be such as require the decision of the court of dernier resort, and not such as are well settled and of familiar application. *Jenkins v. Pearson*, 381.

REVERSAL. See ERROR.

REVERSION. See DEDICATION, 4; TENANT FOR LIFE.

REVIEW. See that title under EQUITY.

SALE—

1. Distinguished from bailment as between depositor and warehouseman. *Chase v. Washburn*, 244.
2. A sale and conveyance of a mill or manufacturing establishment, as such, by any general name or terms of description commonly understood to embrace all its essential parts, passes the machinery belonging to such mill or establishment, whether affixed to the freehold or not; but otherwise, if the language is merely descriptive of the realty, with its appurtenances. *Teaff v. Hewitt*, 511.

See VENDOR AND PURCHASER.

SALARY—

Where the duties of an office are specified and limited in their character, and not continuous during the year, an annual salary prescribed by law, as the compensation, will be payable and apportioned with reference to the duties performed, and not to the lapse of time. *Lawrence ex parte*, 431.

SELF-DEFENSE. See CRIMES, 3, 4, 5.

SPECIFIC PERFORMANCE. See that title under EQUITY.

SPIRITUOUS LIQUORS—

The legislature had the power, on the ground of protecting the health, morals, and good order of community, to revoke or provide the mode of revoking the unexpired licenses to retail liquors, granted under the act of 1831, but the exercise of this power, without refunding the money obtained for the license, would be an act of bad faith, and as repeals by implication are not favored, and penal statutes are strictly construed, such an operation will not be given to the law by mere implication, in the absence of words directly and clearly expressive of such intention. *Hira v. The State*, 15.

See LICENSE, 1, 2.

STATUTES EXAMINED AND CONSTRUED—

1. STATUTES OF THE UNITED STATES.

The proviso in the act of March 2, 1807 (2 U. S. Stat. at Large, 424), to

Statutes Examined, etc.

STATUTES EXAMINED, ETC.—*Continued.*

extend the time for locating Virginia military warrants. Effect of entry and survey. *Price v. Johnson*, 390.

2. STATUTES OF NORTH-WEST TERRITORY.

The law of December 6, 1800 (1 Chase, 291). Town plat and record thereof. *Williams v. Presbyterian Society*, 478.

3. STATUTES OF OHIO.

1. *General.*

1. The act of March 15, 1838 (Swan, 717). Assignments in trust to prefer creditors. *Doremus v. O'Harra*, 45; *Atkinson v. Tomlinson*, 237.
2. The act of March 12, 1831 (Swan, 426), for the prevention of gaming. Section 9, names of persons permitted to play. *Buck v. The State*, 61. Sections 3 and 4, betting on elections. *Veach v. Elliott*, 139.
3. The act of January 17, 1846 (44 Ohio L. 10). The more effectually to prevent gambling, does not repeal, but is in aid of act of March 12, 1831. *Buck v. The State*, 61.
4. The act for the relief of the poor (Swan, 637). Section 13, as to gifts and grants to the poor, and capacity of trustees of townships to take devises. *Urmey's Executor v. Wooden*, 160.
5. The act of March 23, 1850 (48 Ohio L. 33), to improve the law of evidence. Who competent as witnesses. *Lawson v. Salem Bank*, 206; *Butt v. Butt's Adm'r*, 222. Right of cross-examination. *Legg v. Drake*, 286.
6. The act of March 23, 1852 (50 Ohio L. 93), regulating appeals to district court. Section 3, fixing the amount of bond. *Hubble v. Benick*, 171. Section 4, appeal of part of cause by party who has a separate interest. *Dougherty v. Walters*, 201. Section 1, construed. *Knoup v. Piqua Bank*, 603.
7. The act of February 24, 1848 (46 Ohio L. 92, sec. 4). Forfeiture in case of usurious loan by bank, to be for use of common schools. Repealed by act of 19th, 1850, and effect of the repeal. *Preble Branch Bank v. Russell*, 313.
8. The act of February 24, 1848 (46 Ohio L. 90, sec. 3). Bill of review. What it should contain. *Creed v. Lancaster Bank*, 1.
9. The act of June 1, 1831 (Swan, 898), granting licenses and regulating taverns. Effect of the act of March, 1851, to restrain the sale of spirituous liquors, upon licenses already granted. *Hirn v. The State*, 15.
10. The act of March 12, 1851 (49 Ohio L. 87), to restrain the sale of spirituous liquors. *Ib.* 15.
11. The act of April 30, 1852 (50 Ohio L. 67), relating to the organization of courts of justice. Construed as to writs of error. *Shepler v. Dewey*, 331.
12. The act of February 25, 1848, section 3. Dispensing with the entry of recognizances on the journal. *Ohio v. Crippen*, 399.
13. The crimes act (Swan 232, sec. 15). Robbery by putting in fear. Taking from the person "personal property." Construed. *Turner v. The State*, 422.
14. The practice act in chancery (Swan 701, sec. 7). Publication of notice to non-residents. Extends to lunatics. *Sturges v. Longworth*, 544.
15. The act regulating arbitrations (Swan 64, sec. 11). Objections must be made at the term when award is entered, or they are too late. Section 12, not necessary that actual proof of execution of submission bond should be made—the proof may be waived. *Commissioners Montgomery County v. Carey*, 463.
16. The act of March 16, 1838 (Swan, 650). Declaratory of the law on mortgages. *Brown v. Kirkman*, 116.
17. The act for the relief of occupying claimants (Swan, 650). Deed; assessment; judgment. *Beardsley v. Chapman*, 118.
18. The act for the assessment and taxation of property, April 13, 1852 (50 Ohio L. 166, sec. 74). Appeal from auditor of state. Unconstitutional.

Statutes Examined, etc.—Stocks.

STATUTES EXAMINED, Etc.—*Continued.*

- Logan Branch Bank *ex parte*, 432. Section 77, repealing clause. Effect on the taxes due and uncollected under act of 1851. *Debolt v. Trust Company*, 564.
19. The act of March 12, 1845, directing the mode of proceedings under injunctions to stay levy and sale of particular property. Section 4, effect of dissolution. *Teaff v. Hewitt*, 543.
 20. The act of February 24, 1845 (43 Ohio L. 24), to incorporate the State Bank of Ohio. Section 60, taxing clause, exemption. *Debolt v. The Ohio Life Insurance and Trust Company*, 568; *Knoup v. Piqua Bank*, 603. Lien on stock. *Conant v. Seneca Co. Bank*, 298.
 21. The act of March 21, 1851 (49 Ohio L. 56), to tax banks and bank stock the same as other property, etc. *Debolt v. Trust Company*, 564. *Knoup v. Piqua Bank*, 603.
2. *Local.*
1. The act of January 18, 1851, to authorize the commissioners of Hamilton county to erect public buildings (49 Ohio Local Laws, 130). *Ex parte David A. Black*, 30.
 2. The act of March 22, 1850, amending charter of city of Cleveland. *Seovill v. Cleveland*, 126.
 3. The act of February 20, 1851, creating Rollersville and Portage Free turnpike road. *Rollersville Road v. Sandusky County*, 149.
 4. The act of February 14, 1849, creating Lake and Trumbull plank road company. *Loomis v. Spencer*, 153.
 5. The act of March 1, 1851, authorizing the Commissioners of Clinton county to subscribe to the capital stock of the Cincinnati, Wilmington, and Zanesville Railroad Company, held to be valid under the constitution of 1802. *C. W. & Z. Railroad v. Comm'rs Clinton Co.*, 77.
 6. The act authorizing the trustees of townships through which the Steubenville and Indiana Railroad was located, to subscribe to the capital stock of the company, valid under the constitution of 1802. *Steubenville R. R. Co. v. Trustees North Tp.*, 105.
 7. The act to create the new county of Auglaize, requiring Allen county to pay a portion of the debts of Putnam, valid. *Commissioners of Putnam v. Auditor of Allen*, 322.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATION.

STOCKS—

1. By the provisions of the "act to incorporate the State Bank of Ohio, and other banking companies" (43 Ohio L. 24), a bank holds a lien on the shares of its stockholder for the amount of his indebtedness to it, which can not be defeated by a transfer made without the consent of a majority of the directors, nor will such consent authorize a transfer if the debt is overdue and unpaid. *Conant v. Seneca County Bank*, 298.
2. Although an assignment on the books of the bank may be necessary to pass a legal title to stock, yet an equitable title may be otherwise conveyed, and the bank is bound to respect such equity from the time it receives notice of it. Hence debts contracted by the assignor to the bank, after the receipt of such notice, are not, as against the assignee, liens upon the stock. *Ib.* 298.
3. Notice of such assignment to the cashier is notice to the bank. *Ib.* 298.
4. Where a person holds a full and perfect equitable title to stock, of which the bank has notice, he is also entitled in equity to the dividends thereafter accruing upon it. *Ib.* 298.
5. Shares in railroad companies are personal property, whether the companies are, or are not, subject to the provisions of the "act regulating railroad companies," passed February 11, 1848. *Johns v. Johns*, 350.

Subscriptions—Taxes.

SUBSCRIPTIONS. See RAILWAY.

SURETY. See PRINCIPAL AND SURETY.

SURVEY—

1. The holder of a warrant for lands in the Virginia military district, before location or entry, has no such specific equity to any particular tract as a court of chancery can notice or enforce. *Price v. Johnson*, 390.
2. An entry and survey, made in the name of a deceased person, is, upon general principles, void. It does not appropriate the lands included in it, nor, in such case, does the equitable title pass from the government to his heirs. *Ib.* 390.
3. The proviso in the act of Congress of March 2, 1807, "to extend the time for locating Virginia military warrants," etc. (2 U. S. Stat. at large, 424), does not confirm, or make valid, such entries and surveys, so as to vest any specific equity to the lands in such heirs. *Ib.* 390.
4. But said entry and survey under said proviso has the effect to *withdraw the lands*, included in it, from subsequent location upon other warrants, and to leave the title, legal and equitable, in the Government; and while it remains there subject to appropriation only upon the warrant on which such attempted entry and survey was made. *Ib.* 390.
5. The purchasers of land under a void decree, it being repudiated by the owners of the warrant, are not estopped from averring that the entry and survey are void, for the purpose of showing that the complainants have no specific equity in the land, and, therefore, no right to demand the legal title. *Ib.* 390.

TAVERNS. See LICENSE, 1, 2. SPIRITUOUS LIQUORS.

TAXES—

1. It was competent for the legislature, under the constitution of 1802, to construct works of internal improvement on behalf of the state, or to aid in their construction by subscribing to the capital stock of corporations created for that purpose, and to levy taxes to raise the means: and by an exercise of the same power to authorize a county to subscribe to a work of that character, running through or into such county, and to levy a tax to pay the subscription. *C. W. & Z. Railroad Company v. Comm. Clinton County*, 77.
2. Such a tax, when thus authorized, is not beyond the legitimate scope of local municipal taxation; nor is it opposed to Art. 8, Sec. 4, of the constitution, declaring that "private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner." *Ib.* 77.
3. The taxing power for such purposes, under that instrument, was an undeniable legislative function, to be exercised at the discretion of the general assembly, and subject to no limitation but that against poll taxes. *Ib.* 77.
4. Under the ninth section of the city charter of Cleveland, providing for the improvement of streets, etc., by a discriminating tax to be levied upon ground bounding on such streets, the committee of estimate and assessment need not be appointed, before adopting the ordinance for its construction. *Scovill v. Cleveland*, 126.
5. Such discriminating assessment for that purpose, laid upon grounds immediately benefited in proportion to such benefit, was a legitimate exercise of the taxing power under the constitution of 1802; nor is the same opposed to section four, article eight, of that instrument providing for the inviolability of private contracts. *Ib.* 126.
6. The act of February 20, 1851, to create the Rollersville and Portage Free Turnpike Road, authorized, but did not require the levy of the tax therein specified, by the commissioners of Sandusky County. *Rollersville Road v. Sandusky County*, 149.

Taxes—Title.

TAXES—Continued.

7. A county treasurer who seizes property to pay a tax assessed without any color of law for its assessment, or under an unconstitutional law (which is the same as no law), is liable in trespass. *Loomis v. Spencer*, 153.
8. But where a valid law provides for the tax, and the illegality of the particular assessment is owing to some error or omission of those charged with the execution of the law prior to the treasurer being called upon to act (that is prior to the delivery of the duplicate to him), and the duplicate is regular on its face, and duly certified, he is not liable for collecting the tax. In such a case, the duplicate affords as ample protection to the treasurer as does an execution regular on its face to a sheriff. *Ib.* 153.
9. The remedy of the tax-payer is against the person or persons who illegally assess the tax or cause it to be done. *Ib.* 153.
10. The power of taxation, being a sovereign power, can only be exercised by the general assembly when and as conferred by the constitution; and by municipal corporations only when unequivocally delegated to them by the legislative body. *Mays v. Cincinnati*, 268.
11. The sum demanded for license to pursue an employment, when used as a means for supplying the public treasury, is a tax on such employment. *Ib.* 268.
12. The city council of Cincinnati have no power to levy such a tax. *Ib.* 268.
13. A distraint by a treasurer against the money and property of an incorporated bank, for taxes assessed against it under the act of March 21, 1851, can not be enjoined in chancery; if the law be unconstitutional the treasurer is liable, as a trespasser in a court of law. *Mechanics' and Traders' Bank v. Debolt*, 591.
14. The right to impose taxes. *Debolt v. Trust Company*, 563.
And see CONSTITUTIONAL LAW, 13, 18.

TENANT IN COMMON—

A tenant in common whose rights may be vindicated by his separate action, is not protected against the statute of limitations or lapse of time by a disability of his co-tenant. *Williams v. Presbyterian Society*, 478.

TENANT FOR LIFE—

A tenant for life obtaining title and possession with notice of the quality of his estate not entitled as against reversioner or remainderman to the benefit of the occupying claimant law. *Beardsley v. Chapman*, 118.

TITLE—

1. Title to lands is not re-conveyed by the mere re-delivery of the deed by the grantee to the grantor. *Baldwin v. Bank of Massillon*, 141.
2. The general rule is that a person is not chargeable with notice of an adversary title in the absence of proof, but that he is to bound to know the defects apparent upon his own title papers, and is required to take notice of the recitals in the chain of deeds or other muniments under which he claims. *Beardsley v. Chapman*, 118.
3. An action of assumpsit for use and occupation, or on the money counts can not be maintained where possession is held adversely under claim of title, and where no contract, express or implied, is shown. *Cincinnati v. Walls*, 222.
4. Although an assignment on the books of a bank may be necessary to pass a legal title to stock, yet an equitable title may be otherwise conveyed; and the bank is bound to respect such equity from the time it receives notice of it. Hence debts contracted by the assignor to the bank, after the receipt of such notice, are not, as against the assignee, liens upon the stock. *Conant v. Seneca County Bank*, 298.
5. Notice of such assignment to the cashier is notice to the bank. *Ib.* 298.

 Title—Trusts and Trustees.

TITLE—Continued.

6. Where a person holds a full and perfect equitable title to stock, of which the bank has notice, he is also entitled in equity to the dividends thereafter accruing upon it. *Ib.* 298.

See TRUSTS AND TRUSTEES, 9, 11, 12, 13.

TOWN PLAT—

Under the territorial law of December 6, 1800 (1 Chase, 291), a stranger was not authorized to make a town plat and cause it to be recorded, unless the original proprietors were dead, or had removed from the territory. *Williams v. Presbyterian Society*, 478.

TREASURER—

1. A county treasurer who seizes property to pay a tax assessed without any color of law for its assessment, or under an unconstitutional law (which is the same as no law), is liable in trespass. *Loomis v. Spencer*, 153.
2. Where a valid law provides for the tax, and the illegality of the particular assessment is owing to some error or omission of those charged with the execution of the law prior to the treasurer being called upon to act (that is, prior to the delivery of the duplicate to him), and the duplicate is regular on its face, and duly certified, he is not liable for collecting the tax. In such case, the duplicate affords as ample protection to the treasurer as does an execution regular on its face to a sheriff. *Ib.* 153.
3. The remedy of the tax-payer is against the person or persons who illegally assess the tax, or cause it to be done. *Ib.* 153.

TRUSTS AND TRUSTEES—

1. No trust will fail for want of a trustee. A court of chancery will supply the defect. *Urney's Ex'rs v. Wooden*, 160.
2. The statute of 1838 (Swan, 717), relating to conveyances to trustees in trust to prefer creditors, does not apply to the case of a creditor taking security for a debt from an insolvent debtor, where the security is taken in good faith, and where the sole object of it is to secure a debt. *Atkinson v. Tomlinson*, 237.
3. Where A. and B. are the sureties of C., and C., in failing circumstances, makes a transfer, in good faith, to A. and B. solely for the purpose of securing them for their liabilities for him, such transaction does not fall within the statute of 1838; but they have a right to the proceeds of such property, to be applied exclusively to the payment of the debts for which they are liable. *Ib.* 237.
4. A residuary clause in a will, in these words: "The remainder of my estate I do hereby give and devise to the poor and needy, fatherless, etc.," of two townships named, "to such poor as are not able to support themselves, to be divided as my executors may deem proper, without any partiality," is valid and effectual for the purposes therein expressed. *Urney's Ex'rs v. Wooden*, 160.
5. The courts of chancery in this state, upon general principles, independently of the statute of charitable uses (43 Elizabeth), have jurisdiction to enforce such trusts. *Ib.* 160.
6. The spirit and policy of the act for the relief of the poor (Swan, 637, sec. 13), would also confer such jurisdiction, and sustain the bequest. *Ib.* 160.
7. If a debtor make an assignment to pay debts, some of which are usurious, no beneficiary of the trust who comes in under it can object to the payment of such usurious debts. *Busby v. Finn*, 409.
8. A deed to certain persons, as "Trustees of the Presbyterian Congregation of Cincinnati, and their successors forever," "for the use, benefit, and behoof of the aforesaid congregation forever," there being then but one such congregation, is not void for uncertainty as to the beneficiaries of the trust, although they were not then incorporated. *Williams v. Presbyterian Society*, 478.

Trusts and Trustees—Use and Occupation.

TRUSTS AND TRUSTEES—*Continued.*

9. A dedication by the original proprietors of a town of a parcel of ground therein, for public uses, is valid, although they held but an equitable estate in the premises; and their trustee, holding but a naked legal title for their use, is bound to respect such dedication. *Ib.* 478.
10. Where a trustee, with a knowledge of his *cestui que* trust, makes a conveyance apparently in derogation of the trust, and undisturbed possession is held, and improvements made, during a long period, *e. g.* fifty years, by the grantee and those claiming under him, in which period no claim is asserted by the *cestui que* trust, it may be presumed that he, for a sufficient consideration, directed or acquiesced in the conveyance. *Ib.* 478.
11. Although it is true, as a general rule, that, as between trustee and *cestui que* trust, lapse of time is no bar, yet it is equally true that where the former, with the knowledge of the latter, disclaims the trust, either expressly or by acts that necessarily imply a disclaimer, and an unbroken possession follows in the trustee and those claiming under him, for a period equal to that prescribed in the act of limitations to constitute a bar, such lapse of time, under such circumstances, may be relied upon as a defense. *Ib.* 478.
12. Where a legal estate is granted or devised to trustees, without words of perpetuity, upon trusts of perpetual duration, there is much reason and authority for holding that the legal estate, taken by the trustees, is comensurate with the trust, and, therefore, a fee. *Ib.* 478.
13. But wherever the legal title goes, upon the death of the grantee or devisee, it remains charged with the trust. And even if the trustees do not take a fee, yet if the trust is created by deed, containing a covenant of general warranty binding the grantor and his heirs forever, such deed may operate by way of estoppel to confirm to the beneficiaries of the trust the perpetual and beneficial estate in the land. *Ib.* 478.

TRUSTEES OF TOWNSHIP—

1. Could be authorized by act of the legislature, under the constitution of 1802, to subscribe to the capital stock of a railroad company located through the township. *Steubenville Railroad Company v. Trustees North Township*, 105.
2. Competent to take as trustees, by the act for the relief of the poor (Swan 637, sec. 13), under a residuary clause in a will, in these words: "The remainder of my estate I do hereby give and devise to the poor and needy, fatherless, etc.," of two townships named, "to such poor as are not able to support themselves, to be divided as my executors may deem proper, without any partiality," is valid and effectual for the purposes therein expressed. *Urney's Ex'rs v. Wooden*, 160.

UNCERTAINTY—

1. A residuary clause in a will, in these words: "The remainder of my estate I do hereby give and devise to the poor and needy, fatherless, etc.," of two townships named, "to such poor as are not able to support themselves, to be divided as my executors may deem proper, without any partiality," is not void for uncertainty. *Urney's Ex'rs v. Wooden*, 160.
2. A deed to certain persons, as "Trustees of the Presbyterian Congregation of Cincinnati, and their successors forever, for the use, benefit, and behoof of the aforesaid congregation forever," there being then but one such congregation, is not void for uncertainty as to the beneficiaries of the trust, although they were not then incorporated. *Williams v. Presbyterian Society*, 278.

See RECOGNIZANCE, 1, 3.

USE, CHARITABLE. See TRUST AND TRUSTEE, 4, 5, 8, 13.

USE, PUBLIC. See DEDICATION.

USE AND OCCUPATION—

1. An action of assumpsit for use and occupation, or on the money counts,

 Use and Occupation—Vendor and Purchaser.

USE AND OCCUPATION—*Continued.*

can not be maintained where possession is held adversely, under claim of title, and where no contract, express or implied, is shown. *Cincinnati v. Walls*, 222.

2. The defendant having been for a long time in the adverse possession of a ferry-landing in the city of Cincinnati, and receiving rents therefor, is not liable to the city for such receipts until the right of the city to such landing is established by a proper proceeding for that purpose. *Ib.* 222.

USURY—

1. A note or other obligation taken by a bank limited by its charter to six per centum interest upon its loans, is void, if more than that is reserved or paid, for want of corporate power to enter into such contract. *Stevens v. Bank of Wooster*, 233.
2. Such defense may be made to a suit brought to enforce such contract in equity as well as at law. *Ib.* 233.
3. The validity of a note given in Connecticut is to be determined by the laws of that state, under which any contract reserving more than six per centum interest per annum is absolutely void. *Palmer v. Yarrington*, 253.
4. The 9th section of the act of Feb. 24, 1848 (46 O. L., 91), suspended the right to make the defense of usury, but allowed an action against the bank to recover the money for the use of schools. The repeal of this law in 1850 restored the right to defend. *Preble Branch Bank v. Russell*, 313.
5. The law of 1848 only operated upon the remedy, still leaving the contract void and expressly forfeited; and consequently its subsequent repeal, and the revival of the right to defend, did not in any manner affect or impair any provision of a valid contract. *Ib.* 313.
6. The Bank of Norwalk was restricted by its charter to six per centum per annum, in advance upon its loans; any contract upon which it knowingly took interest at a greater rate was void; it had no right to take interest under the name of attorney's fees for collection, and a mistake of law upon its part would not exempt it from the consequences of taking illegal interest. *Busby v. Finn*, 409.
7. But an error in calculation, an accidental omission of a credit, or a transfer by mistake of an item from one account to another, will not make a security usurious and void, there being no intent to exact or take unlawful interest. *Ib.* 409.
8. A contract untainted with usury when made, will not become void by a subsequent receipt of usurious interest upon it. *Ib.* 409.
9. A judgment upon an usurious contract can not be collaterally impeached, and when made the consideration for another contract, such consideration is not void. So long as the judgment stands it estops the parties to deny the legality of the consideration. *Ib.* 409.
10. When a debtor voluntarily pays the collection fees of the creditor's attorney, and no part of them is retained by the creditor, but they all go to the attorney, and the transaction is not a shift to obtain usurious interest, a note subsequently given by a surety of the debtor for a balance of the debt remaining due is not void for usury. *Ib.* 409.
11. If a debtor makes an assignment to pay debts, some of which are usurious, no beneficiary of the trust who comes in under it can object to the payment of such usurious debts. *Ib.* 409.

VENDOR AND PURCHASER—

1. Vendee may maintain an action against vendor, upon a title bond to recover damages for a failure to convey, without restoring possession of the premises. *Taylor v. Browder*, 225.
 2. No action will lie by obligee against obligor on a bond, the consideration of which is a sale made by the former to the latter to defraud creditors; both of them having been guilty of the fraudulent intent. *Goudy v. Gebhart*, 262
- See VOID AND VOIDABLE, 4.

Verdict—Will.

VERDICT—

Where an offense forms but one transaction, and the indictment contains several counts on which the jury have returned a verdict of guilty, it is error in the court to sentence on each count separately. *Woodford v. The State*, 428.

See JUDGMENT, 5.

VIRGINIA MILITARY DISTRICT. See SURVEY.

VISITORIAL POWER—

The dedicators of property to public use have not, by mere operation of law, exclusive of any provision in the act of dedication, a visitorial power. *Williams v. Presbyterian Society*, 478.

VOID AND VOIDABLE—

1. In a chancery proceeding, where it appears *affirmatively* that minor defendants have not been served with process, or notified by publication, a decree, purporting to determine the rights of such minors, is void. *Moore v. Stark*, 369.
2. The appointment of a guardian *ad litem* for minor defendants, who have not been served with process, does not affect an appearance for them, nor give the court jurisdiction over them; the appointment of a guardian *ad litem* is for the purpose of defense after appearance has been effected by service of process, or by publication on the infants. *Ib.* 369.
3. The decree of a Virginia court for the sale of lands lying in Ohio is entirely inoperative to transfer or affect any interest of the owner, either legal or equitable. *Price v. Johnston*, 390.
4. The purchasers of the land, under such void decree, it being repudiated by the owners of the warrant, are not estopped from averring that said entry and survey are void, for the purpose of showing that the complainants have no specific equity in the land, and therefore no right to demand the legal title. *Ib.* 390.
5. An entry and survey, made in the name of a deceased person, is, upon general principles, void. It does not appropriate the lands included in it, nor, in such case, does the equitable title pass from the Government to his heirs. *Ib.* 390.
6. The proviso in the act of Congress, of March 2, 1807, "to extend the time for locating Virginia military warrants," etc. (2 U. S. Stat. at large, 424), does not confirm or make valid such entries and surveys, so as to vest any specific equity to the lands in such heirs. *Ib.* 390.
7. But such entry and survey, under said proviso, has the effect to *withdraw the lands* included in it, from subsequent location upon other warrants, and to leave the title, legal and equitable, in the Government; and while it remains there subject to appropriation only upon the warrant on which such attempted entry and survey was made. *Ib.* 390.

See USURY, 1, 3, 19.

WAIVER. See ARBITRATION, 4. ERROR, 10, 11.

WAREHOUSEMAN. See BAILMENT, 1, 2, 3.

WARRANT. See SURVEY.

WILL—

1. A residuary clause in a will in these words: "The remainder of my estate I do hereby give and devise to the poor and needy, fatherless," etc. of two townships named, "to such poor as are not able to support themselves, to be divided as my executors may deem proper without any partiality," is valid and effectual for the purposes therein expressed. *Urney's Executors v. Wooden*, 160.
2. The courts in chancery in this state, upon general principles, independently of the statute of charitable uses (43 Elizabeth), have jurisdiction to enforce such trusts. *Ib.* 160.

Will—Writings.

WILL—Continued.

3. The spirit and policy of the act for the relief of the poor (Swan, 637, section 13), would also confer such jurisdiction and sustain the bequest. quest. *Ib.* 160.
4. No trust will fail for the want of a trustee. A court of chancery will supply the defect. *Ib.* 160.
5. A testator can not, by any words of exclusion used in his will, disinherit one of his lawful heirs, in respect to property not disposed of by his will. *Crane v. Doty*, 279.
6. Such words can not be used to control the course of descent, so as to carry the property to his other heirs. *Ib.* 279.
7. They can not be used to raise an estate by implication, in favor of his other heirs; there being no attempt in the will to dispose of the property to or create any interest therein. *Ib.* 279.

WITNESS—

1. Where a mortgage is defective in its execution, by having the name of but one witness subscribed to the attestation clause, the official signature of the justice of the peace to his certificate of acknowledgment will not, under the statute, answer a double purpose and supply the deficiency in the attestation. *White v. Denman*, 110.
2. The heir is a competent witness for the administrator, under the act to improve the law of evidence, in a suit brought by the latter to recover a debt due the estate. *Butts v. Butts Adm'r*, 222.
3. Stockholder in bank competent as a witness in a case to which the bank is a party. This by force of the statute to improve the law of evidence. *Lawson v. Salem Bank*, 206.
4. Where a party to an action is called upon and introduced as a witness on the trial by the adverse party, under the act of March, 1850, to improve the law of evidence, the objection to his competency is waived, and he becomes competent as a witness on the trial for all purposes. *Legg v. Drake*, 286.
5. When a witness is produced and examined by a party in an action, even though he be interested to testify against the party calling him, the other party is not limited, in his cross-examination, to the subject-matter of the examination-in-chief, but may cross-examine him as to all matters pertinent to the issue on the trial, limited, however, by the rule, that a party can not, before the time of opening his own case, introduce his distinct grounds of defense or avoidance, by the cross-examination of his adversary's witnesses. *Ib.* 286.
6. When the cross-examination is extended to topics disconnected with the particular facts disclosed in the direct examination, leading questions to the witness may be proper or improper according to circumstances, and the control of this must rest within the discretion of the court. *Ib.* 286.
7. The principal in a note, sued jointly with his sureties, who suffers a default, and against whom a separate judgment is entered, is a competent witness for such sureties, upon the issue joined between them and the plaintiff. *Preble Branch Bank v. Russell*, 313.

WRITINGS—

1. The affidavit of a party to a suit may be received to prove the loss of a writing, in order to let in secondary evidence of its contents. *Wells v. Martin*, 386.
2. The fact of loss is to be established to the satisfaction of the court, not conclusively, for that is not required, but reasonably. To do this may, in some cases, where there is more than one party on the side offering the testimony, require the affidavits of all of them. In other cases, an affidavit of one of them may be sufficient. No general rule can be laid down upon the subject. The ruling must depend upon the circumstances of each case. *Ib.* 386.

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